DOCUMENT RESUME

ED 332 903 SO 021 246

AUTHOR	Morrissey, James M.
TITLE	Rights and Responsibilities of Young People in New York. A Legal Guide for Human Service Providers. Revised and Updated.
INSTITUTION	New York State Bar Association, Albany.
PUB DATE	90
NOTE	120p.
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC05 Plus Postage.
DESCRIPTORS	*Childrens Rights; Elementary Secondary Education; *Human Services; Juvenile Justice; *Laws; Legal Responsibility; *Youth; Youth Problems
IDENTIFIERS	*New York

ABSTRACT

This manual is designed for human service providers--including social workers, counselors, teachers, child care workers, probation officers, nurses and physicians--to help them with questions about the legal rights and responsibilities of young people in New York State. The document is directed at human service providers because they are seen as persons to whom young people are likely to turn for help, and because such providers are frequently unable to offer informed assistance on legal matters. The seven chapters cover: (1) an overview; (2) minors and the family; (3) minors and public assistance; (4) minors and school; (5) minors and medical treatment; (6) minors, the courts, and the police; and (7) miscellaneous. It should be noted that while the manual is designed to provide accurate and authoritative information about the rights and responsibilities of young people in New York state, the information is not the equivalent of rendered legal advice. Readers also should be aware that the information on laws and their interpretation, while up to date, is subject to changes, as all laws are. (DB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED332903

Rights and Responsibilities of Young People in New York

A Legal Guide for Human Service Providers

BEST COPY AVAILABLE

NYSBA

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☒ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
ERIC S
MONDSCHEIN
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

SO 021 246

©Copyright 1990. All rights are reserved, except that any
part of this publication may be reproduced in any manner without
the written permission of the publisher, provided that
credit is given to the publisher for its availability.

Published by the New York State Bar Association, Albany, New York

Rights and Responsibilities of Young People in New York

A Legal Guide for Human Service Providers

This Edition Revised and Updated by James M. Morrissey, Esq.

prepared by the Law Youth & Citizenship Program of the New York State Bar Association,
and the New York State Education Department

This publication is made possible through a grant from the Interest On Lawyers Account Fund

Preface

In our complex society, the rights and responsibilities of all people are regulated by a vast array of court decisions, laws, rules and regulations. Young people, because of their minority, are particularly subject to regulation; yet they generally have less access to assistance to guide them through the maze of governing authorities and systems. As a result, many young people turn to human service providers -- including social workers, counselors, teachers, child care workers, probation officers, nurses and physicians -- for help. The young person may have specific questions about his or her legal rights, or may present a problem or situation which raises legal issues not apparent to the young person.

Unfortunately, human service providers are frequently unable to offer informed assistance because they lack (i) training in the law, (ii) access to knowledgeable attorneys, and (iii) a practical guide to which they may turn for information.

Indeed, very few attorneys have broad knowledge about the rights and responsibilities of young people. The applicable law is scattered throughout hundreds of volumes of court reporters, statutes, and regulations and is largely inaccessible to all except those who specialize in the field. Professionals who work with young people have frequently expressed the need for an explanatory manual to "pull together" these disparate laws into a single, comprehensive volume. That is the purpose of this manual. The manual is geared primarily to "non-lawyers," although attorneys should find it a useful tool of first reference. "Legalese" is avoided as much as possible, and we have attempted to explain rules of law in clear, understandable language.

A few disclaimers are in order. First, the manual is designed to provide accurate and authoritative information about the rights and responsibilities of young people in New York State, but in publishing it, we are not, and cannot render legal advice to the reader. If legal advice, or other expert assistance is required, the services of an attorney should be sought. Second, laws and their interpretation change. The information set forth is current up to the date of publication, but the reader should be aware that there will be post-publication changes in the law and should seek further information concerning such changes. Last, this is a survey of the legal rights and responsibilities of young people, not a definitive analysis of all areas of law which affect minors.

Acknowledgments

On behalf of the Law, Youth and Citizenship Program of the New York State Bar Association and the New York State Education Department, we would like to express our gratitude and appreciation to the Interest On Lawyers Account Fund for making this publication possible and for their commitment to the enhancement of legal services and the administration of justice.

We would like to thank James M. Morrissey, Esq., Executive Director of Neighborhood Legal Service, Inc., Buffalo, New York for his time, effort and devotion in revising and updating this edition.

We also would like to acknowledge Jeffrey C. Thrope, Esq., as co-author, with Mr. Morrissey, of the original edition of this publication, as well as those who supported and assisted with the first edition: Linda Pitts, Mary McCurry, Ronald Soloway, Joseph Gatti, Lenore Gittis, Carol Sherman, Janet Fink, Janet Price, Jane Spinak, Charmaine Randolph, Robert Schalk, Paula Galowitz, and the New York City Department of Youth Service, which provided funding for the first edition.

We would also like to express our appreciation to Mary DeMarco-Golden for her editing assistance for this edition.

Eric S. Mondschein
Director
Law, Youth and Citizenship Program

Wayne P. Kunz
Assistant Director
Law, Youth and Citizenship Program

TABLE OF CONTENTS

PAGE

PREFACE i

ACKNOWLEDGMENTS iii

CHAPTER I — OVERVIEW

Introduction 1

Parental Sovereignty 1

Child Welfare 2

Children's Rights 2

Confidentiality 4
- Laws Which Apply to a Program as a Whole 4
  - Runaway and Homeless Youth Act 4
  - Drug and Alcohol Programs 4
  - Department of Social Services 5
- Laws Specific to Particular Service Providers 5
  - Certified Social Workers 5
  - Physicians, Dentists, Nurses 6
  - Psychologist 6
  - Clergy 7
  - Other Professionals 7
- Frequent Questions 7
- Advocacy Suggestions 8

Conclusion 10

CHAPTER II - MINORS AND THE FAMILY

Introduction 13

General Principles 13

Parental Support 14
- General Duty 14
- Criminal Law and the Failure to Meet the Parental Duties 14
- Support Outside of the Home 14
- Parental Misconduct 15
- Summary 16

Emancipation 16
- Introduction 16

- Definition . . . 16
- Uses of Emancipation for Minors . . . 17
  - Right to Retain Wages . . . 17
  - Right to Sue Intrafamily Torts . . . 17
  - Right to Establish Domicile . . . 17
  - Right to Receive Public Assistance . . . 17
  - Receipt of Medical Care . . . 17
- What Emancipation Does Not Do . . . 18
  - Signing a Lease . . . 18
  - Right to Marry . . . 18
  - Obtain Employment Certificate . . . 18
  - Buy, Sell or Control Real Property . . . 18
  - Engage in all Occupations . . . 18
  - Right to Parental Support . . . 18
  - Bring a Court Action . . . 18
  - Right to Vote . . . 18
- Summary . . . 18

Runaways . . . 18
- Introduction . . . 18
- New York State Runaways . . . 19
- Out-Of-State Runaways . . . 19
- Runaways and Police . . . 20
- The Runaway and Homeless Youth Act . . . 20
- Summary . . . 21

Table . . . 21

Marriage . . . 22
- Minors Below 14 . . . 22
- Minors Between 14 And 16 . . . 22
- Minors Between 16 And 18 . . . 22
- Persons Over 18 . . . 22
- Minors Married Out-Of-State . . . 22
- Illegal Marriages Generally . . . 22

Paternity Proceedings . . . 23
- Introduction . . . 23
- Time for Bringing Paternity Action . . . 23
- Hearings . . . 23
- Order of Filiation . . . 23
- Acknowledgment of Paternity . . . 23
- Summary . . . 23

Custody . . . 24
- Introduction . . . 24
- Custody of Minor Between Parents . . . 24
- Minors' Right to Custody of Their Child . . . 24
  - Generally . . . 24
  - Rights of Custody Between Minor-Parents . . . 24
  - Minors' Right to Custody Against Non-Parents . . . 24

Visitation 25
  Introduction 25
  Child Born in Wedlock 25
  Child Born Out of Wedlock 25
  Grandparent Visitation 25
  Summary 26

Foster Care - Voluntary Placement 26
  Introduction 26
  Voluntary Placement 26
  Return of Child From Voluntary Placement 28

Child Maltreatment 28
  Introduction 28
  Definition of Abuse 29
  Definition of Neglect 30
  Who Must Report 32
  Client Confidentiality 32
  Liability for Making a Report 32
  Failure to Make a Required Report 32
  The Process After a Report is Made 32
  Emergency Situations 33
  What Does The Family Court Process Look Like 34
  Disposition When Neglect or Abuse is Established 35
    Suspended Judgement 35
    Order of Supervision 35
    Placement 35
    Order of Protection 36
  Summary 36

Foster Care and Termination of Parental Rights 36
  Introduction 36
  Abandonment 36
  Mental Illness or Mental Retardation 37
  Permanent Neglect 37

Adoption 37
  Introduction 37
  Procedure for Surrender to an Agency 38
  Procedure for Surrender Before a Court 38
  Revocation 38
  Private Placement Adoptions 38
  Summary 39

Guardians 39
  Summary 40

Harassment Proceedings in Family and Criminal Court 40
  Family Offense Proceedings 40
  Criminal Procedure 41
  Summary 42

Involuntary Commitment to a Mental Health Facility .43
Mental Health Warrant .43
Involuntary Commitment .43
Summary .44

CHAPTER III - MINORS AND PUBLIC ASSISTANCE

Introduction .45
General Comments .45
Types of Programs .46
Fair Hearings .47
Minors With No Children Living Apart from their Families .47
Minor With No Children Who Lives With Relatives .48
Pregnant Minor Living With Parents .49
Pregnant Minors Living Alone .49
Pregnant Minors and Medicaid .49
Minor Parents Living Apart from their Parents .49
Minor Parent Living With Family .49
Minor Parent Living With Relatives .50

Social Security Benefits .50
Who is Eligible .50
How to Apply .51
How are Benefits Determined .51
Representative Payees .51
Supplemental Security Income .52

Miscellaneous Questions .52

CHAPTER IV - MINORS AND SCHOOL

Introduction .57

Attendance .57
Attendance - Generally .57
Compulsory Attendance .58
Handicapped Students .58
Deinstitutionalized Students .59
Children Leaving Foster Care .59
Undocumented Children .59
Students with AIDS .59
Pregnant Students .59
Student Parents .59
Students Not Living With Parents .59
Education of Homeless Children .60

Special Education .61
Committee on Special Education .61
Student with Handicapped Condition .61
Special Education .62
Related Services .62
Least Restrictive Environment .62

- Resource Rooms .62
- Individualized Educational Program .63
- Impartial Hearings .63

CSE Process .63
- How it Begins .63
- Evaluation .64
- Placement .64
- Impartial Hearings .64
- Frequent Special Education Questions .65

Immunization .66

School Records .68
- Introduction .68
- Access to School Records .68
- Challenges to Inaccurate Information .68
- Release of Records .69
- Summary .69

Suspension .69
- Definition .69
- Principal's Suspension .69
  - Authority .69
  - Procedure .69
  - Length of the Suspension .70
  - Summary .70
- Superintendent's Suspensions .70
  - Authority .70
  - Procedure Before the Suspension .70
  - Procedures After the Suspension .70
  - Alternate Instruction .72
  - Summary .72

Corporal Punishment .72

School Discipline - Special Situations .73
- In-School Suspensions .73
- Suspensions for Truancy .73
- Suspension for Conduct Which Occurs Off School Grounds .73
- Cheating .74
- Suspension from Summer School .74
- Suspension from Extra-Curricular Activities .74
- Forfeiture of Varsity Letter .75
- Graduation Exercises .75
- Pledge of Allegiance .75
- School Prayer .76
- Lateness .76
- Suspension from Bus Transportation .76
- Dress Code .76
- Relationships of Grades to Absences .76
- Late Homework Assignments .77

Search and Seizures 77
Disciplinary Codes 78
Censorship in High Schools 78
Suspensions and Expulsions from Private School 79
Involuntary Transfers 79

Employment Certificates 79
Persons who Must Obtain Employment Certificates 79
Special Work Permits - Farm Work 80
Special Work Permits - Street Trade 80
Special Work Permits - Newspaper Carriers 80
Special Work Permits - Child Performers 80
Special Work Permits - Child Models 80
Employment Certificates - Types 80
Procedures for Obtaining an Employment Certificate 81

Interschool Athletic Activities 81

High School Diplomas 82

Remediation 82

General Equivalency Diplomas 82

Local Certificates 83

Independence and Financial Aid 83

Educational Malpractice 84

CHAPTER V - MINORS AND MEDICAL TREATMENT

Introduction 85
General Age of Consent 86
Minor Parent 86
Married Minors 86
Pregnant Minors 86
Emancipated Minors 87
Mature Minors 87
Runaways 87
Emergency Care 87
Mental Health - In-Patient Treatment 88
Administering Antipsychotic Medication 88
Mental Health - Out Patient 89
Abortion 89
Contraception 89
Sterilization 89
Sexually Transmitted Diseases 90
Alcohol Abuse 90
Drug Abuse 90
Blood Donation 90
HIV Testing and Treatment 90

CHAPTER VI - MINORS, THE COURTS AND THE POLICE

Introduction 91

Categories of Criminal Offenses 91
  Felonies 91
  Misdemeanors 91
  Violations 92

Right to an Attorney 92

Capacity to Commit Crimes 92

Drug Laws 92

Minors and the Police 92

People in Need of Supervision 94
  Introduction 94
  Court Procedure 94
  Summary 95

Juvenile Delinquency 95
  How the Process Begins 96
  Court Process 96
  Summary 97

Designated Felonies 97

Juvenile Offenders 98

Youthful Offender 100

Statutory Rape and Other Sex Offenses 101
  Homosexual Relationships 101
  Sexual Misconduct and Abuse 101
  Corrupting the Morals of a Minor 101

Criminal Offenses Relating to Children 101
  Endangering the Welfare of a Minor 102
  Unlawfully Dealing with a Child 102
  Sexual Performance by a Child 102

Minors as Witness to Criminal Proceedings 103
  Introduction 103
  Minors over 12 103
  Minors Under 12 103
  Minors Unable to Understand the Oath 103

Human Service Providers and the Criminal Process 103
  Criminal Suspects and Cooperation With the Police 103
  Sentencing or Disposition 104

CHAPTER VII - MISCELLANEOUS MATTERS

Alcoholic Beverages 105
  Drinking Age 105
  Misrepresentation 105
  Entertainment or Employment in Places Which Sell Alcoholic Beverages 105

Contracts 106
  Necessaries. 106

Draft Registration 107
  Failure to Register and College Financial Aid 107
  Women and Draft Registration 107

Name Changes - Statutory Method 107
  Law Which Governs a Name Change 107
  Persons Who May File a Petition 107
  What the Petition Must Show 108
  Notice to Parents 108
  Factors Which a Court May Consider. 108
  Steps to Take After the Name Change 108

Right to Vote 108

Miscellaneous Provisions 108
  Right to Bring a Court Action 108
  Right to Own Real Property. 108
  Wills 108

CHAPTER I

OVERVIEW

Introduction

In order to understand the law governing young people, it is necessary to review briefly, the historical context within which the legal view of minors has developed and evolved. Laws are reflections of social values; when those values change, there usually is a concomitant change in the law. For example, in 1896, the United State Supreme Court declared "separate but equal" facilities for blacks and whites to be constitutional.[1] But 60 years later, the Court reversed itself, and declared separate but equal facilities to be unconstitutional.[2] On both occasions, the Court interpreted the same provisions of the Constitution, but societal attitudes had undergone a transformation during the intervening 60 years. As societal attitudes about young people have changed, so too have the laws which govern their conduct.

The law governing young people may, at times, seem confusing and inconsistent. This is due, in large part, to major theoretical changes over the past two centuries underlying minors' relationships to parents and the state. The law, as an evolutionary process, often changes in fits and starts, with some areas redefined within a contemporary context while other areas remain archaic and unchanged. There have been three major movements with which the reader must be familiar in order to make sense of the rights of minors -- an area which more resembles a patchwork quilt than a smooth continuous piece of cloth.

Parental Sovereignty

Codified in early Colonial America, the parental sovereignty approach was borrowed from English common law and holds simply that parents have absolute authority over their children, much as they would over a piece of property or a farm animal.[3] Children had no constitutional or protective rights of their own, with the exception of the right to support from their parents. As a corollary to their obligation to support, parents were entitled to their children's absolute obedience, as well as to the fruits of their labor. A law in 17th century Massachusetts provided that any child over the age of 16 who struck his parents or overseers could be put to death unless it could be proved that "said parents or overseers were very unchristainly negligent."[4] These very tights puritan controls were a consequence of the social and economic conditions of colonial society. The role of children had very strong economic determinants because of the work they could perform, and the wages they could earn in a subsistence economy. As a theological matter, children were thought to be evil creatures whose sins could be repressed only by rigorous discipline.[5]

---

[1] Plessy v. Ferguson, 163 U.S. 537 (1896).

[2] Brown v. Board of Education, 347 U.S. 483 (1954).

[3] See, John Locke, "Advice on Family Government," (1690) in Children and Youth in America: A Documentary History, vol. 1, ed. R.H. Bremner (Cambridge: Harvard University Press, 1970), pp. 132-34.

[4] "Instructions for the Punishment of Incorrigible Children in Massachusetts" (1646), in Education in the United States: A Documentary History, vol 1, ed. S. Cohen (New York: Random House, 1974), pp. 370-71.

[5] See J.F. Kett, Rites of Passage: Adolescence in America, 1970 to the Present (New York: Basic Books, 1977), Chapter 1.

Child Welfare

The 19th and early 20th centuries ushered in a series of radical transformations which caused a fundamental reassessment of childhood with an emphasis on the child as a dependent and immature being with specific, age-related needs. Psychological concepts were introduced, leading to a developmental perspective with the need for nurturance of children during their tender years.[6] Also, social reformers were greatly disturbed by the merciless exploitation of children within the work place. This reassessment had a profound impact on the legal view of children.

Child labor laws and compulsory education laws were widely adopted. Parents still enjoyed wide latitude in raising their children but, for the first time, the state began to dictate minimum child care standards against which a parent's actions would be judged. Parents could no longer put their children to work in the factories. Parents were now required to send their children to school. The state had taken an active role as the final protector of the young and the incompetent, and began acting as the final arbiter of the child's best interests. This role is referred to as "*parens patriae*." Child abuse and neglect laws are, perhaps, the best examples of the child welfare perspective.

It was during this period that the first "child care" agencies and juvenile courts appeared. These were a manifestation of the belief that children were not evil *per se*, but rather went wrong due to environmental factors, often within the family. There was a continued emphasis on the family, but there also was a perceived need for official agencies of social control as effective remedies for family failure.

The first juvenile court was established in Illinois in 1899. The court was authorized to intervene benevolently to protect the young.[7] The reformers responsible for this, and other juvenile courts, thought that society's duty to the child should not be confined by the concept of punitive justice. Rather, the child brought before the court should feel that he or she was the object of the state's nurturing care.

In keeping with this rehabilitative model of the court, the juvenile court proceedings were informal, non-adversarial and diagnostic in purpose. Juvenile court procedures were described as "civil," not "criminal," and, therefore, the minor enjoyed few of the constitutional rights of an adult subject to criminal prosecution. Thus, minors could be institutionalized for years, but did not have the right to notice of the charges against them, the right to cross-examine accusers, or the right against self-incrimination -- all under the guise of the state protecting their best interests.[8]

Children's Rights

While the child welfare laws represented a redefining of the relationship of minor to parents and the state, minors did not gain the right to self-determination. All that occurred was that the state elected to place itself in the parents' stead when the latter were found wanting. The basic premise that children could not exercise constitutional rights until they reached the age of majority prevailed. One or another adult continued to decide what was in the minor's best interests. This premises has come under scrutiny since the 1960's.

The first object of this scrutiny was the juvenile justice system. Reformers began to suggest that not only was the juvenile court ineffective as a benevolent therapeutic agent, but it actually fostered juvenile crime. The Supreme Court began to balance the state's right to deprive juveniles of their liberty without full due process protections (based on the theory of benevolent intervention), against the rehabilitation it actually provided. The latter was found wanting. In *Kent v. United States*,[9] decided in 1966, the Supreme Court invalidated a waiver procedure through which a minor accused of a serious crime could be transferred to adult criminal court without a statement of reasons, a hearing, or assistance of counsel.

---

[6] "The Mental Hygiene Movement," in Bremner, Children and Youth in America, vol. 2 (1977), pp. 1040-57.

[7] See Reports of the National Juvenile Assessment Center, C.P. Smith, et al., *A Preliminary National Assessment of the Status Offender and the Juvenile Justice System: Role Conflicts Constraints, and Information Gaps* (Washington, D.C.: U.S. Department of Justice, Law Enforcement Assistance Administration, Office of Juvenile Justice and Delinquency Prevention: U.S. Government Printing Office), p. 12.

[8] See In re Gault, 387 U.S. 1 (1967).

It was one year later, however, that the Supreme Court sounded the death knell for the juvenile court system as it was then constituted across the nation. In 1967, the Supreme Court considered whether the rather informal juvenile court process by which a minor could be found to be delinquent and thereby committed to an institution was constitutional. Gerald Gault, a 16-year-old, together with a friend, was accused of making an obscene phone call to a neighbor. The neighbor reported him to the juvenile authorities, who found Gerald in need of rehabilitation and remanded him to an institution for a period that could have extended to his twenty-first birthday. Gerald was not given notice of the charges against him, was not allowed to cross-examine his accuser, and was not provided with representation by an attorney. In holding that this procedure was not constitutional, the Court stated that the juvenile court history had demonstrated that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[10]

The Court held that minors subject to delinquency proceedings should be accorded nearly all of the constitutional rights enjoyed by adults subject to criminal prosecution. In a later case, *In re Winship*,[11] the Court further held that the standard of proof must be "beyond a reasonable doubt" before a minor may be adjudicated a delinquent for an act which would constitute a crime if committed by an adult.

There have been limitations, however. In *McKeiver v. Pennsylvania*,[12] the Supreme Court refused to extend the right of trial by jury to the juvenile courts, holding that it was not a constitutional requirement, nor a necessary component to accurate fact-finding. In 1984, in *Schall v. Martin*,[13] the Supreme Court upheld the use of pretrial preventative detention of minors accused of being delinquent on the basis that it served the legitimate state objective of protecting minors from the hazards of pretrial crime.

The view that minors have constitutional rights has not been limited to the juvenile justice system. In *Tinker v. Des Moines Independent Community School District*,[14] decided in 1969, the Supreme Court extended the right of free speech to students within the school setting. In pronouncing that students do not shed their constitutional rights at the school house gate, the Court refused to uphold the suspension of three teenagers who, against the principal's wishes, wore black armbands to protest the war in Vietnam. The Court ruled that students were entitled to express their views unless it would cause significant disruption or otherwise significantly interfere with the educational process.[15]

Also, within the school setting, the Supreme Court ruled in *Goss v. Lopez*,[16] decided in 1975, that students in public school, subject to suspensions, were entitled to some constitutional protection. Thus, at a minimum, before students may be suspended, they must be given notice of the allegations of misbehavior, an explanation of the evidence against them, and an opportunity to explain their side of the story.[17]

---

[9] Kent v. U.S., 383 U.S 541 (1966).

[10] In re Gault, 387 U.S. 1, 18.

[11] In re Winship, 397 U.S. 358 (1970).

[12] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[13] Schall v. Martin, 467 U.S. 253 (1984).

[14] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[15] More recent pronouncements of the Supreme Court, however, have sharply limited the First Amendment rights of students. See "Censorship in the Schools."

[16] Goss v. Lopez, 419 U.S. 565 (1975).

[17] But see "School Searches."

The ability to consent to sex-related health care is the third major area in which minors have been granted significant constitutional rights. In *Roe v. Wade*,[18] decided in 1973, the Supreme Court held that adult women have a constitutionally protected privacy right to determine whether or not to terminate pregnancy, a right which cannot be unreasonably infringed by others. (Note: The Constitution does not guarantee an absolute right to an abortion.) In 1976, the Supreme Court extended this privacy right to minors, striking down a law which required parental consent before a minor could obtain an abortion. This privacy right has been upheld as recently as 1983.[19]

Confidentiality[20]

Human service providers often are confused about the concept of confidentiality -- when it can be guaranteed and when it must be broken. This confusion is quite understandable because a provider may be subject to more than one set of contradictory rules. A thorough analysis of this topic is beyond the scope of this manual -- in fact, it would be a complete manual in and of itself. Thus, we will outline the relevant laws and the most obvious concerns to the human service providers. Expert assistance should be sought if more information is needed or required.

Laws governing confidentiality can be divided into two broad categories -- those which apply to programs as a whole, and those which apply to communications between the individual human service provider and the young person, for example a physician and a patient. We describe each below.

Laws Which Apply to a Program as a Whole

Runaway and Homeless Youth Act: (*Executive Law* § 532 *et. seq.*) Programs which receive funds from New York State to provide shelter services to runaways are subject to the Runaway and Homeless Youth Act, which requires that information about a client may not be released without the written consent of the client. At least three courts have upheld, in the strongest of terms, the confidential nature of records maintained by Runaway and Homeless Youth Shelters.[21]

The Act, however, requires that programs notify parents of the runaway's "physical and emotional condition, and the circumstances surrounding the runaway youth's presence at the program [even over a young person's objection], unless there are compelling circumstances" not to do so. Where such compelling circumstances exist, the program must file a petition in the family court, or refer the youth to the local social services district, or where child maltreatment is suspected, make an appropriate report. *Executive Law* § 532-c. In any event, a case of suspected child abuse or neglect must be reported. *Executive Law* § 532-b(1)(f).

Drug and Alcohol Programs: (21 U.S.C. § 1175, 42 C.F.R. Part 2 *et. seq.*[22]) Any program which provides drug or alcohol counselling or treatment, and which receives any federal funding, is subject to very strict regulations regarding the release of *any* records or information about the client, even if these do not bear directly on the substance abuse treatment.[23] Release is, in most cases, permitted if the client signs a consent form containing certain specified information. A program may not release records without the client's written consent even if subpoenaed by a court -- there must be a special court order. In August of 1986, this law was amended to permit the reporting of incidents of suspected child abuse and neglect to the appropriate state or local authorities without the requirement of the client's consent or the need of a court order. The law applies to the initial report and not to requests for additional information. Also, the mere fact that a client has abused alcohol or drugs should not constitute the basis for a report, there must be harm or danger to the child. We strongly recommend that programs subject to the drug and alcohol regulations seek assistance for questions regarding record release. The Legal Action Center is one resource with expertise in this area. (212-243-1313).

---

[18] Roe v. Wade, 410 U.S. 113 (1973).

[19] Bellotti v. Baird, 443 U.S. 622 (1979); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). But advocates should be aware that the Supreme Court has granted the states greater rights to regulate abortions.

[20] We are indebted to Anne B. Donahue, Esq., whose memo on confidentiality prepared for Under 21 helped us organize and draft this section.

[21] See People v. Feijoo, 131 Misc.2d 980 (Sup. Ct. N.Y. Co. 1986); People v. Garcia, 128 Misc.2d 810, 491 N.Y.S.2d 552 (Fam. Ct. Kings Co. 1985); Matter of Sonya M., 115 Misc.2d 207 (Fam. Ct. Nassau Co. 1982); Matter of Covenant House/Under 21, (S. Ct. N.Y. Co., decided March 22, 1983).

[22] U.S.C. is an abbreviation for "United States Code." C.F.R. is an abbreviation for "Code of Federal Regulations."

[23] Commissioner of Social Services v. David R.S., 451 N.Y.S.2d 1 (Ct. App. 1982).

Department of Social Services: Authorized child care agencies and programs which operate young adult shelters also may be subject to the other confidentiality laws. (*See Social Service Law* §372, 18 N.Y.C.R.R. § 450.18.)

Laws Specific to Particular Service Providers[24]

Certified Social Workers: Section 4508 of the Civil Practice Law and Rules provides a qualified privilege, as follows:

> A person duly registered as a certified social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person working for the same employer as the certified social worker or for the certified social worker be allowed to disclose any such communication or advice given thereon; except:
>
> 1. that a certified social worker may disclose such information as the client may authorize;
> 2. that a certified social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;
> 3. where the client is a child under the age of sixteen and the information acquired by the certified social worker indicates that the client had been the victim or subject of a crime, the certified social worker may be required to testify fully in relation to thereto upon any examination, trial or other proceeding in which the commission of such a crime is a subject of inquiry.

A few comments about the statute. First, the privilege may be limited to social workers who are certified.[25] Second, the privilege extends not only to the certified social worker but also to other persons working with the social worker including clerical staff and student interns.[26] Third, there may be an obligation to breach confidentiality if the client threatens harm to self or others, for example suicide or homicide.[27] In such situations, expert assistance should be sought. Fourth, social workers have an affirmative obligation to report instances of child maltreatment (see "Child Maltreatment").

The social worker may be compelled to testify at inquiries concerning services provided to clients under 16 who have been the victim of a crime. This requirement should not be confused with a legal obligation to report a crime where the victim is under 16 years of age. We have not found a statute which places an affirmative obligation on social workers to report where a young person is the victim of a crime other than in the child maltreatment context.

---

[24] The reader should also be aware of any professional ethical obligations which may prohibit disclosure.

[25] The express language of the statute seems to limit the privilege to certified social workers.

[26] See Weinstein, Korn and Miller, *New York Civil Practice*, 4508.1.

[27] See Tarasoff v. Regents of the University of California 17 Cal.3d 425, 551 P.2d 334, 131 Ca. Rptr. 14 (1976); Huntley v. New York, 62 N.Y.2d 134 (1984).

Physicians, Dentists, Nurses: Section 4504 of the Civil Procedure Laws and Rules provides in part:

> (a) *Confidential information privileged.* Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.
>
> (b) *Identification by dentist; crime committed against patient under sixteen.* A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

This statute also applies to those working with physicians, dentists or nurses in providing health services. The privilege applies only to information gathered in, and necessary to, the rendering of a health service.[28]

As with social workers, physicians, dentists and nurses may be required to divulge information regarding treatment provided to a young person under 16 who has been the victim of a crime but there is no affirmative obligation to do so.

Moreover, physicians are required to report to police authorities "[e]very case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument," *Penal Law* § 265.25, and instances where a patient suffers second or third degree burns to more than 5% of his body *Penal Law* § 265.26. Physicians, dentists and nurses are also required to report cases of suspected child maltreatment. However, except as explained above, there is no duty to report to the police instances where a young person is the victim of a crime. Indeed, such a report over a patient's objection could result in civil liability.

Last, the physician who is a psychiatrist may have an obligation to report to the police or parents, situations where a person threatens to harm self or others.[29] This duty may extend to other mental health professionals. Before making such a report, however, expert assistance should be sought. Disclosure of information without the patient's consent and without serious justification could result in civil liability for damages.[30]

Psychologist: Section 4507 of the Civil Procedure Laws and rules provides in part:

> The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

This very broad privilege tracks the attorney-client privilege. Thus, apparently, it may be breached only if the client plans to commit a crime, is the victim or perpetrator of a child maltreatment, or plans harm to self or others. There is no provision that a psychologist may be required to testify about treatment provided to a person under 16 years of age who has been the victim of a crime.

---

28 People v. Newman, 32 N.Y.2d 379 (1973).

29 See Footnote 27 above.

30 MacDonald v. Clinger, 89 A.D.2d 482, 446 N.Y.S.2d 801 (4th Dept. 1982).

Clergy: Section 4505 of the Civil Procedures Law and Rules provides:

> Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.

Clergy are not listed among the professionals required to report instances of suspected child maltreatment. However, if they perform the role of one of the professionals required to report (i.e., a social worker), they may be obligated to report.[31]

Other Professionals: Even when not covered by one of the statutes listed above, information regarding a client should be held confidential unless there is a compelling reason to do otherwise. In our experience, the assurance of confidentiality is essential for a young person to develop trust in the human service professional.

Frequent Questions

May I always release information with a client's consent?

Generally speaking, yes. The only exception of which we are aware is in the federal drug and alcohol regulations which would permit a provider to refuse to release information in some cases if such release is not in the client's best interest.[32]

Is there a requirement that I notify parents when a minor receives an abortion?

No. There is no requirement of parental notification when a minor obtains an abortion. In fact, such notification may constitute an unjustified violation of the client's confidentiality rights.

Is there a requirement that I notify parents when a minor is prescribed a contraceptive?

No. As of this writing there is no requirement of parental notification when a minor is prescribed contraceptives.

Can I guarantee a client complete confidentiality?

No. There are situations where a human service provider may be required to disclose information if asked (e.g., minor as victim of crime) or may have an affirmative obligation to make a report (e.g., child abuse). Thus, complete confidentiality can never be guaranteed.

What obligation do I have if a client threatens harm to self or others?

This question is extremely complex, and the obligation of the human service provider depends on the facts of the case. Some courts have held that therapists have a duty to warn the potential victim or alert the police where a patient discloses an intent to harm a reasonably identifiable person, and the therapist reasonably believes, or should believe, that the client will act on the threat. There may be similar obligations when a client threatens suicide and the therapist forms the reasonable belief that the client might actually commit suicide.[33] However, this area of the law is evolving and great care is required in such situations. Thus, the provider faced with one of these extreme situations should seek expert assistance.

---

[31] See Keenan v. Gigante, 47 N.Y.2d 160 (1979), cert. den. 444 U.S. 887 (1980) (privilege applies only to communications made to clergy acting in spiritual capacity).

[32] See 42 C.F.R. § 2.40(a).

[33] See Footnote 27 above.

Can I be held liable for damages for wrongful disclosure?

Several New York courts have held that psychiatrists can be held liable for damages for wrongful disclosure of information regarding a patient.[34] This might be applied to other therapists as well. Thus, a disclosure without a patient's consent must have some legal basis.

Can parents be forced to disclose what their children have told them?

The answer to this question is not certain. At least one court has ruled that a young person's admission of a crime to his mother, which was overheard by a police officer, was privileged. The statement therefore could not be introduced as evidence of the young person's guilt.[35] Other courts have agreed that there is a parent-child privilege. But the question has not been decided by the New York Court of Appeals, the highest state court.

Do I have an obligation to report to the police when a young person is the victim of a crime?

With the exception of a child abuse, which involves harm to children under 18 years of age caused or allowed to be caused by a parent or person in parental relationship to the child (see "Child Maltreatment"), and the requirement that physicians report gun shot, and stab wounds, and curtain burns, we have not found a law which requires such reporting. Note that certified social workers, physicians, dentists and nurses can be required by statute to divulge information about treatment provided to a person under 16 who has been the victim of a crime if asked (see above), but this does *not* create an affirmative obligation to report.

What is a subpoena?

A subpoena is an order, signed by a court or an attorney, to compel testimony in a court or administrative proceeding. The subpoena can be for the testimony of a witness, or may require the production of records (subpoena duces tecum).

Must I honor a subpoena?

A subpoena must never be ignored. If the young person does not object to the subpoena and consents in writing to release of the information, it should be honored. (Providers should note that the federal drug and alcohol regulations permit programs to refuse to release information even if consented to, if it is not in the best interests of the client.) If the young person does not want a record released, we suggest that, as an initial step, the provider call the person who issued the subpoena and ask that it be withdrawn. The person who issued the subpoena, once apprised of any privileges which may exist, or how the subpoena may undermine the purpose of the youth program, may agree to voluntarily withdraw it. Otherwise, an attorney should be consulted. Programs subject to federal drug and alcohol regulations may *not* honor a mere subpoena if the client objects. These records may be released only pursuant to a court order.

Advocacy Suggestions

In many instances, it is appropriate for human service providers to act as advocates for their clients with schools, administrative agencies, or others. In many cases, problems can be resolved through such advocacy. If it is not, legal assistance should be sought. Advocating on behalf of a client is a skill learned through trial and error. We have advocated on behalf of clients before many different agencies. We list below several advocacy suggestions which we have found helpful in resolving clients' problems. While by no means exhaustive, they should provide a useful framework within which to effectively advocate on behalf of a client. Throughout this discussion, we will refer to the persons with whom we are advocating as the "agency representative."

Know Your Client: Obtain as much relevant information as possible from your client. This would usually include, at least, age, address, school, living situation, family situation, court involvements, and information specific to your client's presenting needs or questions. By developing a complete profile of client, you will be better able to identify possible legal issues and take steps toward their resolution. Also, you should not necessarily be limited to obtaining information specific to what the client perceives as the problem. Oftentimes, clients will have legal problems of which they themselves are unaware. Getting as much information as possible is the key.

---

[34] See, for example, the case cited in Footnote 30 above.

[35] People v. Harrell, 87 A.D.2d 21 (2d. Dept. 1982).

Identify the Problem: Identify and precisely define the problem you hope to solve. This is perhaps the most important step. A right unknown is no right at all. If more than one problem is presented, separate them and apply the steps below to each individually. Separating problems makes them less overwhelming to the client and advocate alike. If lack of resources prevents you from working on more than one problem at a time, rank them by priority and settle the most pressing needs first. You must, however, be aware of any time limitations within which you must act. For example, a fair hearing must be requested within 60 days of a public assistance case closing.

Identify the Applicable Rule: In many cases, your instincts that your client has been treated unfairly, incorrectly, or illegally may not be enough to resolve a problem. If possible, always try to identify the applicable rules. If you don't already know the rules covering a specific situation, look in this manual, or other resource books for a discussion of the area involved. You might also ask your co-workers or supervisors, who may have come across this particular problem, or you might consult an advocate or attorney with expertise in the area.

Identify the Resource: The next step is to determine who is the agency representative you should contact in order to try to resolve the problem through informal discussion or negotiations. This could be, for example, the local school or department of social services. Generally, one should start at the lowest level of the hierarchy which can solve the problem and then, if the problem is not resolved, appeal to the next higher authority. Within the school system, this might mean starting with the principal, then the district superintendent, then the board of education, and finally the State Commissioner of Education. Before contacting the agency representative, you must obtain your client's consent. This is especially important in agencies which the federal substance abuse confidentiality rules apply (see "Confidentiality"). But it is also important in other contexts to foster the client's confidence and trust and to avoid perceived breaches of confidentiality.

Contact the Agency Representative and Presume that the Problem Can Be Resolved Amicably: When initially contacting the agency representative, assume that the problem can be resolved amicably. Oftentimes, the representative will be simply unaware of the problem or of the law governing the problem. Therefore, the advocate can serve as a valuable source of information and prime mover in the resolution of the problem. In this connection, it will be particularly helpful if you can inform the agency representative of the reasons why his or her actions are incorrect and give citations to support your position. Also, you should ask the agency representative to specify the rules or regulations on which he or she is relying.

Avoid Confrontations: Contrary to popular notions, the advocate should rarely become involved in heated exchanges with the agency representative. Such exchanges serve only to harden the positions, making reasonable discussion and problem resolution impossible. The advocate should be courteous but firm. Avoiding conflict often is very difficult when faced with unreasonable or illegal positions taken by agency representatives. Rather than engaging in protracted arguments, proceed to the next step.

Fist In A Velvet Glove: When a problem cannot be resolved, inform the agency representative that you will appeal to the next higher authority, and specifically name that person if known. If you do not know the name of the supervisor, politely ask the agency representative.

Appeal Unsatisfactory Answers: Any determination that you believe is unfair or illegal should be appealed to the next level in the hierarchy. This is often successful because: (1) a person not immediately involved with a problem can often consider your request in a more detached manner, and (2) the higher one moves in the hierarchy, the higher the level of sophistication regarding the rights of young people. When appealing to a higher authority, make reference to representatives already contacted. Also, be as sure as you can of the facts and rules governing the situation and be careful not to misrepresent any facts; while the client might benefit in the short run, the misrepresentation may be discovered later, to the detriment of the present client, as well as to your credibility as an advocate for future clients.

Sometimes the agency representative will tell you that your information concerning the applicable rules is wrong. While this is, of course, possible, you should not simply take the agency representative's word for it. Ask him or her for a specific reference to rules and regulations supporting a decision. You can check those rules with your own references (for example, this manual, or an advocate, or an attorney). If you are sure that your information is correct, note the authority relied on by the worker and continue to the next level of command.

Make Sure Entitlements are Implemented: Once a problem is resolved, do the follow-up necessary to make sure that the resolution is actually implemented. This is, perhaps, the most common shortcoming of advocates.

Recognize Limitations: Without doubt, you will encounter problems that you cannot resolve. The problem may not be covered in the manual or may require a specialized advocate. It happens to all of us. When it does, make a referral to an organization or person with the necessary expertise.

Acknowledge Good Work: When an agency representative has been helpful, be sure to tell him or her so and, if possible, write a letter to the same effect with a copy to the supervisor. The next time you need assistance from that person, you may have an ally.

Keep Notes: Always keep notes on each conversation you have with an agency representative. Each note should include the name and telephone number of the person spoken to, and date and subject of the conversation, and any agreements made. Such notes are an invaluable help when appealing unsatisfactory answers or in doing follow-up.

Recurring Problems: If over the course of a few weeks or months, you become aware of the same or similar misapplications of the rules, you may wish to contact an advocacy or legal services organization to let them know that the problem exists. This information about recurring problems often is known only to providers. Even if you are able to resolve each client's problem, the rights of the many clients who face the particular agency without the assistance of an advocate may benefit through educational efforts, administrative negotiations, litigation, and other activities which might be undertaken based on the information supplied by you.

Final Note: As already discussed, the law is not static. Laws and regulations are amended from time to time, and they may be interpreted or re-interpreted by the courts. Thus, it is possible that the rules referred to in reference materials may be changed after publication. Make notations directly in this manual of any post-publication changes of which you become aware.

Conclusion

The result of the changes outlined above is that the law regulating minors represents a hodgepodge of differing, and sometimes, conflicting assumptions. The parental sovereignty perspective remains a strong influence. For example, in New York, a parent still has a statutory claim to the wages of a minor child[36] and the Supreme Court has repeatedly reaffirmed the centrality of the family unit and the power of parents to exercise control over their minor offspring.[37] At the same time, the child welfare perspective is most evident. Earlier we discussed the fact that, in 1984, the Supreme Court upheld the use of pretrial detention for juveniles charged with crimes. The underlying theory of the decision is the protection of juveniles against their own improvidence -- to paternalistically decide what is in the juvenile's best interests. This decision is all the more interesting (and disturbing) because it involved the juvenile justice process, an area where minors have been accorded significant constitutional rights of their own.

---

[36] New York General Obligations Law § 3-109.

[37] See, for example, Parham v. J.R., 442 U.S. 584 (1979) (parents allowed to commit child to mental facility over child's objections as long as certain minimal due process requirements are met); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children excused from compulsory school attendance laws).

Last, the children's rights perspective is still in its early stages of development and will continue to have a wide impact on judicial decisions and legislative enactments. In reading the various sections of the manual, the reader is encouraged to consider which school of thought the various laws discussed represent.

CHAPTER II

MINORS AND THE FAMILY

Introduction

In this section, we address the minor and the family, including the minor as a child within the family unit, the minor as a parent, and the minor living alone away from the family. We have divided our discussion into the following categories:

- General Principles
- Parental Support
- Emancipation
- Runaways
- Marriage
- Paternity Proceedings
- Custody (of the minor and the minor's child)
- Visitation
- Foster Care - Voluntary Placement
- Child Maltreatment
- Foster Care and the Termination of Parental Rights
- Adoption
- Legal Guardians
- Harassment Proceedings in Family and Criminal Court
- Involuntary Commitment to a Mental Health Facility

Many of the principles of law discussed in this section will apply to adults as well as minors; for example, the rights of parents are quite similar regardless of whether the parent is an adult or minor.

General Principles*

As a general matter, parents, whether minors or adults, have the right to the custody and control of their children, especially as against the state or third persons. Parents can determine family rules and regulations, as long as they are reasonable. Parents can name their children and determine in which religion they will be brought up. Parents can decide where their children will be educated as long as they comply with compulsory school attendance laws. Parents can discipline their children as long as they do not do so in such a severe manner as to violate child maltreatment laws. Parents may generally determine what type of medical care their children will receive.

In short, the right of parents, including minor-parents, to the care, custody and control of their children is one of the most fundamental rights enjoyed in our society. Thus, minors are subject to the authority of their parents, and minors under 16 who disobey their parents may find themselves subject to a proceeding in family court. (See "Persons in Need of Supervision") By the same token, minor parents may exercise those same parental rights over their own children.

Parent's fundamental rights are at their strongest when children are young and in most need of guidance. But, as we shall see, minors as they approach older adolescence are granted increasing degrees of autonomy by the law. On occasion there can be tension between the historic right of parents to control their children and the increasing need of minors to exercise independent decision-making as they approach the age of majority.

---

* For a more detailed analysis of general principles, see Martin Guggenheim and Alan Sussman, *The Rights of Parents*, Avon Books, New York, New York (1980).

In the sections that follow, we will discuss when minors may exercise independent decision-making, and when they remain subject to parental authority. We will also discuss the limits of parental authority to make determinations regarding their children.

Parental Support

General Duty

As a general matter, parents, if they are financially able, are responsible for the support of their children under age 21. *Domestic Relations Law* § 32, *Family Court Act* § 413. The right to parental support is one of the most fundamental rights enjoyed by persons under age 21. However, this obligation will not be enforced against parents who do not have sufficient financial means (nor could it be as a practical matter).[1] Also, this general legal obligation does not require that parents pay tuition to a private school or college unless one of the parents has made a specific agreement to do so (i.e., as part of a divorce settlement),[2] or there are special circumstances requiring such payments. In determining whether such special circumstances exist, a court would look to: (a) the educational background of the parents, (b) the environment in which the children grew up, (c) the child's academic background, and (d) the parent's ability to provide funds.[3]

In exchange for the right to support from their parents, children under age 21 have the legal obligation to obey the reasonable rules and regulations of the household. In several cases, New York courts have relieved parents of the duty to support children under 21 who refused to obey reasonable parental rules. These cases (discussed below) involved older adolescents away from home and are not likely to be applied to younger children who are disobedient. Finally, absent an express agreement, parents cannot be required to support children 21 or over.[4]

Criminal Law and the Failure to Meet Parental Duties

In New York, it is a crime for a parent charged with the care and custody of a child less than fourteen years of age to desert the child "with an intent to wholly abandon it." *Penal Law* § 260.00. Also, "a person is guilty of [the crime of] non-support of a child when, being a parent ... charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do so, or becomes unable to do so, when, though employable, he voluntarily terminates his employment, voluntarily reduces his earning capacity or fails to diligently seek employment." *Penal Law* § 260.05. Finally, it is a crime for a parent charged with the custody of a child less than 18 years of age to fail or refuse "to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child', or a 'neglected child', a 'juvenile delinquent' or a 'person in need of supervision'" as those terms are defined in the Family Court Act. *Penal Law* § 260.10(2).

Support Outside of the Home

Children under 21, who leave home without parental consent, or refuse to comply with reasonable parental regulation, or refuse to visit with a noncustodial parent, probably forfeit the right to parental support. As a general matter, parents cannot be required to support children who adopt a lifestyle with which they disagree, or children who refuse to acknowledge the legitimate right of a parent to exercise some role in their upbringing. A few case examples will help illustrate this point.

---

[1] See, for example, People v. Hinton, 40 N.Y.2d 345 (1976).

[2] Kaplan v. Wallshein, 57 A.D.2d 828, 394 N.Y.S.2d 439 (2d Dept. 1977).

[3] See, for example, Lord v. Lord, 409 N.Y.S.2d 46 (Sup. Ct. N.Y. Co., 1978).

[4] Drago v. Drago, 138 A.D.2d 704, 526 N.Y.S.2d 518 (2nd Dept. 1988).

In *Roe v. Doe*,[5] a 20-year-old sought court ordered support from her father. The father had been paying her college expenses, but had instructed his daughter to live in a dormitory. Ignoring her father's request, the daughter sold her car, which had been a gift from her father, and moved off campus. The daughter then chose not to live home after graduating from school. She did, however, seek court ordered support for past due tuition (which her father refused to pay after she moved off campus) and current living expenses. The Court of Appeals, in refusing to order support, stated:

> The father has the right, in the absence of caprice, misconduct or neglect, to require that the daughter conform to his reasonable demands. Should she disagree, and at her age that is surely her perogative, she may elect not to comply; but in doing so, she subjects herself to her father's lawful wrath. Where, as here, she abandons the home, she forfeits her right to support.[6]

The Court of Appeals came to the same conclusion in *Parker v. Stage*.[7] In Parker, the minor left home voluntarily, moved in with her lover, and applied for and received public assistance. The Department of Social Services sought support from her father because of his legal responsibility for his daughter. The father, according to the court, had supported his daughter from birth, urged her to remain home and continue her schooling, always accepted her back after her absences, and made efforts to obtain employment for her. In refusing to order support, the court stated:

> Of course the fact that the child is eligible for public assistance may, as is evident here, permit her to avoid her father's authority and demands however reasonable they may be. But it does not follow that the parent must then finish what has begun by underwriting the lifestyle which his daughter chose against his reasonable wishes and repeated counsel.[8]

Last, in *Cohn v. Schnepf*,[9] a father sought to end court ordered support for his 18-year-old son from a previous marriage. The son had apparently rejected visitation with his father, and had changed his last name to that of his step-father. The court, in holding that the father did not have to continue support payments, stated:

> While it is true that the parental obligation to support a child does not terminate simply because the child is at odds with the parent, it is also true that the child's right to support is not unlimited. A parent has a right to expect a minimum of respect and obedience from his child. [The son has] forfeited his right to claim support from [his father].[10]

Parental Misconduct

If the child under 21 leaves the home because the conditions are unbearable, or because there is insufficient room, or because the parental rules were unreasonable, the obligation of parental support does not end. Parents may not avoid their legal obligations by making life intolerable for their children and forcing them to leave the parental abode or by making unreasonable demands upon their children.[11] Under these circumstances, the child could probably succeed in an action for support against the parents in the family court.

---

[5] Roe v. Doe, 29 N.Y.2d 188 (1971).

[6] Roe at 194.

[7] Parker v. Stage, 43 N.Y.2d 128 (1977).

[8] Parker at 134.

[9] Cohn v. Schneph, 454 N.Y.S.2d 785 (Sup. Ct. Nassau Co., 1982).

[10] Cohn at 787; *see also*, McCarthy v. Braiman, 125 A.D.2d 572, 510 N.Y.S.2d 3 (2nd Dept. 1986).

[11] See, for example, Darene v. Patricia S. 90 Misc.2d 558 (Fam. Ct. Kings Co., 1977); Wayne County D.S.S. v. Schultz, 366 N.Y.S.2d 845 (Fam. Ct. Wayne Co., 1975).

Summary

The law regarding the parental obligation of support represents a sensible balancing of the rights of both parents and children. Children who leave home to pursue their own lifestyle, or because they simply do not want to be subject to reasonable parental regulation, cannot then look to the parents for support.

However, children who leave home for good cause may be able to require their parents to furnish support. When a minor living outside of the home seeks parental support, the reasons why the minor lives outside of the home must be examined closely. If the minor left home because the parents were abusive, or had adopted rules of the household which were unreasonable, the minor may be able to obtain an order of support from the family court. In making this determination, one must apply criteria upon which there is broad public consensus, not on personally held theories of what constitutes good child care practices.

For example, a parent who does not allow the child out of the house from the close of school on Friday to the beginning of school on Monday is probably acting unreasonably, regardless of the fact that the action is prompted by the parent's well-motivated concern for the child. However, a parent who does not allow a child to date until age 16 or who refuses to allow a child's boyfriend or girlfriend to visit the home probably is not. In the final analysis, the determination of good cause will rest with a family court judge whose values will probably be closer to the parent's than to those of the minor.

Emancipation

Introduction

Young people who live away from home frequently come to human service providers seeking to become "emancipated." Unfortunately, emancipation is a concept little understood by courts, young people, lawyers and service providers alike. In this section we define the concept of emancipation and discuss its uses.

Definition

Although different definitions of emancipation are applied in different situations, it is possible to state a relatively simple general definition of emancipation. Emancipation is the renunciation of legal duties by a parent and the surrender of parental rights over the child. It may occur when a parent's conduct is inconsistent with the performance of parental obligations or by the assumption by the child of a status that is inconsistent with subjection to parental control.[12] But what do we look for in determining whether a minor is emancipated? In evaluating whether a young person is emancipated, three factors have been given importance.

First, is the minor living separate and apart from his or her parents? This could be next door or in the next state; what is important is that the minor has set up a separate household. Parental consent to the move is not required. Second, is the minor self-supporting? The source of income is unimportant as long as the minor does not continue to be dependent upon his or her parents. Last, does the minor manage his or her own financial affairs? This could include, for example, having bank accounts or other properties, or paying for rent or food.[13] In addition, minors who are or have been married, or who are in the armed services usually would be considered emancipated. Minors living at home who pay their own room and board on occasion have been considered emancipated.[14]

In New York State, however, there is no such thing as a court declaration of emancipation, nor is there a procedure whereby a minor can conclusively document that he or she is emancipated.

---

[12] Murphy v. Murphy, 133 N.Y.S.2d 796 (Sup. Ct. Broome Co., 1954); Gittleman v. Gittleman, 81 A.D.2d 632, 438 N.Y.S.2d 130 (2d Dept. 1981).

[13] Cochran v. Cochran, 196 N.Y. 86 (1909); Fauser v. Fauser, 271 N.Y.S.2d 59 (Fam. Ct. Nassau Co., 1966); In re Palumbo, 14 N.Y.S.2d 329 (Dom. Rel. Ct. N.Y. Co., 1939).

[14] Hunycutt & Co. v. Thompson, 74 S.E. 628 (N.C. 1912).

Therefore, the service provider must look to the facts of each case for an individual determination of whether a minor is emancipated. The determination should not, however, be over-complicated. The decision of whether a minor is emancipated is one of common sense, applying the criteria listed above. Generally, a good faith determination that a minor is emancipated will be respected.

The service provider should be aware that emancipation does not always serve the interests of the minor. As we shall discuss below, emancipated minors usually cannot demand the right of support from parents, but emancipated minors are not given all of the rights of an adult necessary to live independently. It is incorrect to advise a young person that, by virtue of emancipation, he or she will be treated as an legal adult. Indeed, the emancipated minor is considered an adult for very few purposes. Thus, the reader is advised to review this section carefully before advising young people on emancipation.

Uses of Emancipation for Minors

Right to Retain Wages: Historically, parents were entitled to retain the wages of minor children.[15] In New York, even today, a parent may claim the wages of a minor child upon written notification to the minor's employer within 30 days of the commencement of employment. *General Obligations Law* § 3-109. However, a parent may not legally claim the wages of an emancipated minor.[16]

Right to Sue for Intrafamily Torts: Minor children are not allowed to sue a parent for injuries sustained as a result of the parent's negligence. The judicial reluctance to entertain such action is meant to further family tranquility and to avoid interference with parental control and discipline. But when a minor is emancipated and the parents have thereby renounced all legal obligations to the child, these policy reasons no longer control. Thus, emancipated minors may sue their parents for negligence.[17]

Right to Establish Domicile: The legal residence of the minor is presumed to be that of the parent. This can be a problem for the emancipated minor who, for example, seeks to attend a school but who lives in a school district other than that of the parents. Such minors are often told that they must go to school in their parents' district. This is incorrect (see "Minors and the Schools-Attendance"). Emancipated minors are allowed to establish their own legal residence and may, for example, attend a school in the district in which they live, even if that is different from their parents.[18]

Right to Receive Public Assistance: Emancipated minors are entitled to receive public assistance, provided they meet the other eligibility criteria. For purposes of public assistance, an emancipated minor is defined as "a person over 16 years of age who has completed his compulsory education, who is living separate and apart from his family and is not in receipt of or in need of foster care." 18 N.Y.C.R.R. § *349.5.* (See "Minors and Public Assistance.") From time to time, public assistance administrators have taken the view that, before a minor may receive public assistance, he or she should be required to sue his or her parents for support. This view has been rejected by the courts in *Tucker v. Toia*.[19] Minors, however, can be required to cooperate with the Department of Social Services should it decide to sue their parents, except under very limited circumstances.

Receipt of Medical Care: Emancipated minors may consent to medical care on their own, and providers will not be held liable for providing treatment without parental consent (see "Minors and Medical Treatment-Emancipated Minors).

---

[15] In re Laponzina, 116 N.Y.S.2d 750 (Sur. Ct. Kings Co. 1952).

[16] See Shute v. Dorr, 5 Wend. 204 (1830).

[17] Crosby v. Crosby, 246 N.Y.S. 384 (3rd Dept. 1930); Murphy v. Murphy, *supra.*; St. Croix v. St. Croix, 17 A.D.2d 692, 229 N.Y.S.2d 969 (4th Dept. 1962); Wysocki v. Prior, 24 A.D.2d 732, 263 N.Y.S.2d 342 (4th Dept. 1965).

[18] Cohen v. Delaware L. & W. R. Co., 269 N.Y.S. 667 (Sup. Ct. N.Y. Co. 1934); Stillman v. School District and Board of Education of Rockville Centre, 60 Misc.2d 819 (Sup. Ct. Nassau Co., 1969).

[19] Tucker v. Toia, 43 N.Y.2d 1 (1977).

What Emancipation Does Not Do

Signing a Lease: An emancipated minor has no greater right to enter into a contract than any other minor. Since a lease is a contract, the rules discussed under "Contracts" apply. This means that, while a minor may enter into a lease, the lease is not binding on the minor, but is binding on the landlord. Thus, a minor could refuse to honor a lease, and there is little a landlord could do about it. As a result, most landlords are reluctant to enter into leases with minors. The fact that the minor is emancipated makes no difference.

Right to Marry: The fact that a minor is emancipated does not change the requirement for parental consent to marry. All minors, even emancipated minors, must first obtain such consent to marry (see "Minors and the Family-Marriage").

Obtain Employment Certificate: As a general rule, minors must obtain an employment certificate before they may work. The employment certificate requires parental consent, even if the minor is emancipated (see "Minors and Schools-Employment Certificates").

Buy, Sell or Control Real Property: A person must be 18 to buy, sell, or control real property. *Domestic Relations Law* §§ 80, 84. This applies to emancipated minors as well.

Engage in All Occupations: Child labor laws prohibit minors from engaging in many occupations. The fact that a minor is emancipated makes no difference.

Right to Parental Support: An emancipated minor probably cannot demand support from his or her parents unless the parents' conduct was such that the minor was forced to leave home (see "Minors and the Family-Parental Support"). A different result could obtain where the minor's parents are divorced and one of the parents has contractually agreed to pay child support.[20]

Bring a Court Action: As a general rule, a minor may not bring a lawsuit in his or her own name; the lawsuit must be joined by a parent or an adult representative. *C.P.L.R.* § 1201. (This does not include actions in family court). The fact that a minor is emancipated does not alter this general rule.

Right to Vote: Emancipated minors may not vote by reason of emancipation. One must be 18 years of age to vote. (See "Right to Vote").

Summary

Emancipation usually relieves parents of obligations to their children. Oftentimes, this result seems perfectly appropriate, especially where the minor has left the home without good cause. But emancipation, while freeing the parent, does not adequately free the minor. It deprives the minor of the right to demand food, clothing and shelter from his or her parents, yet it does not confer upon the minor the rights needed to adequately provide those essentials for him or herself. This fundamental lack of reciprocity is disturbing. Thus, the service provider must review carefully with the minor those rights which he or she may obtain through emancipation, and just as importantly, those disabilities which are not affected at all by emancipation. Minors must be disabused of the notion that emancipation confers upon them all of the rights of adulthood.

Runaways

Introduction

Young people are running away in ever increasing numbers. In this section, we discuss when a runaway may legally be required to return home. The rules of law that apply may be different if the runaway has come to New York from another state, as contrasted with an in-state runaway. First we discuss the in-state runaway.

---

[20] Wack v. Wack, 74 N.Y.S.2d 435 (Sup. Ct. West. Co., 1947).

New York Runaways

Young people in New York who run away after their 16th birthday cannot be required to return home.[21]

In New York, the only way a parent can legally require a runaway to return home is to institute a PINS proceeding against the minor in family court. The family court judge, assuming the minor is found to be in need of supervision, can order the minor to return home, or even order placement outside of the home. In PINS cases, the court's authority is limited to actions before the minor's 16th birthday (see "Persons in Need of Supervision").

As a technical matter, a parent could file a PINS petition against a minor up to age 18 for conduct which occurred before the minor's 16th birthday. However, because the family courts are generally overburdened, they would be reluctant to entertain such actions. Thus, it is unlikely that a minor 16 or older would be required to return home, even if the minor ran away before turning 16.

Out-of-State Runaways

The situation may be different if the runaway has come to New York from a different state. This is because of the Interstate Compact on Juveniles (the "Compact").[22] Prior to the Compact, parents did not have an effective way of requiring the return of a child who had run out-of-state, short of going to that state and using its juvenile court process. The Compact, as explained below, provides a procedure through which a parent may, by using their local juvenile courts, require the return of a child who has run out-of-state.

For purposes of defining a runaway, one must look to the laws of the state from which the minor ran. For example, we have already stated that in New York, a runaway is defined as a person under age 16 who has left home without just cause or parental permission. In California, however, runaways are defined as persons under 18 who leave home without parental consent. Under the Compact, a 17-year-old from California, who runs away to New York, can be required by the New York family court to return home, even though the family court cannot require an in-state 17-year-old to return home. The California law is applied by the New York Court. For each state, the age at which minors may leave home without being subject to a court proceeding, and the statutory reference appear on pages 25 and 26.

The steps to require the return of an out-of-state runaway are described below.

1. The parent files a petition with the local juvenile court asking for the child's return. If the judge finds that the parent has the right to custody, a requisition for the runaway is sent to the state in which the runaway is located.
2. Once the requisition is received, a detention order is issued, and the runaway can be taken into custody and brought before the family court.
3. The runaway is brought before the family court, and assuming return is in the best interests of the minor, the court can order that the minor be returned to his or her home state.

If the court of the state from which the minor ran refuses to issue a requisition for the return of the runaway, the family court loses all authority over the minor if 16 or over, even if the court deems the minor destitute.[23] Also, the above procedure cannot be used if the runaway is emancipated,[24] or if the minor left home with parental consent (e.g., a custodial parent, and the child refuses to return).[25] Also, the procedure does not have to be initiated by the parent. For example, an out-of-state runaway could be picked up by the police, and the police could then contact the parents, who could then go to court and ask for the minor's return.

---

[21] But minors under the jurisdiction of the family court at the time they ran away may be required by the court to return home. A minor would be under the jurisdiction of the family court if he or she had been alleged to be a Person in Need of Supervision (PINS), or a Juvenile Delinquent (JD) before running away, and the case was still pending before the family court, or if he or she had been found to be a PINS or a JD by the court, and a disposition was pending or still effective. This would cover a very small percentage of runaways.

[22] Interstate Compact on Juveniles, Unconsolidated Laws § 1801 et seq.

[23] Matter of Bonnie Michelle W., 76 A.D.2d 784, 429 N.Y.S.2d 638, *aff'd* 54 N.Y.2d 820 (1981).

[24] Council on State Governments. *Juvenile Compact Procedures Manual*, August, 1976 Rewrite (Kentucky: Council of State Governments 1976), pp. 7, 25-26.

Runaways and the Police

Section 718 of the Family Court Act authorizes police to take into custody minors under 16 who they reasonably believe have run away from home without just cause. (Note: This law would permit females up to the age 18 to be taken into custody if suspected of running away. This distinction between males and females is probably unconstitutional and would most likely be limited to apply to females up to age 16.) The police may deliver minors to their parents' home, to runaway shelter, or to any other facility designated by the Division for Youth or the Commissioner of Social Services. This law, which vests significant discretion in the police to stop and question minors, was upheld as constitutional (see "Minors, the Courts and the Police").[26]

The Runaway and Homeless Youth Act

New York, in conjunction with the federal government, has developed a state-wide network of organizations and shelters to provide services for runaways. In 1978, New York enacted the Runaway and Homeless Youth Act (the "Act") which governs how the shelter shall be operated.[27] The Act was upheld as constitutional in *Matter of Curran*.[28]

For the purposes of the Act, a runaway is defined as "a person under the age of eighteen years [of age] who is absent from his legal residence without the consent of his parents." *Executive Law* § 532-a(1). A homeless youth is defined as "a person under the age of twenty-one who is in need of services and is without a place of shelter where supervision and care are available." *Executive Law* § 532-a(2).[29] These definitions are important because they delineate who may receive services under the Act. (For purposes of our discussion, both will be referred to as "runaways").

As a general rule, a runaway may use a shelter for up to 30 days, although the stay may be extended under certain circumstances (for example where the parents are alleged to be abusive). Also, if both parents and the runaway agree, the runaway may use the shelter for up to 60 days. *Executive Law* § 532-b(2). The staff of the shelter must notify the parents of the runaway's admission within 72 hours, unless there are compelling reasons not to do so. The parents must be advised of the runaway's physical and emotional health, and the circumstances surrounding the minor's presence in the program. The parent however, does not have to be advised of the minor's location. The parents also must be notified when the custody of the minor is assumed from the shelter by a relative or other person. *Executive Law* § 532-c.

Shelters are required to:

1. Provide assistance to runaways;
2. Attempt to determine the cause of the runaway's status;
3. Explain to the runaway his legal rights and options for service, or other assistance available;
4. Work towards reuniting the runaway with his family;
5. Assist in arranging for necessary services for the runaway; and
6. Report all cases of suspected child abuse or neglect.

Executive Law § 532-b.

---

[25] *Id.* at 5.

[26] Matter of Terrance G., 109 A.D.2d 440, 492 N.Y.S.2d 365 (1st Dept. 1985).

[27] Executive Law § 532 et seq.

[28] Matter of Curran, 488 N.Y.S.2d 983 (Fam. Ct. Oneida Co., 1985).

[29] In 1985, the definition of homeless youth was raised from 18 to 21 years of age. The changes also include fiscal incentives and planning and Division for Youth monitoring requirements for the establishment of "transitional independent living support programs for older adolescents."

Summary

Before counseling a runaway, the following items of information must be obtained:

1. Whether the runaway is from out-of-state;
2. The current age of the runaway and his or her age at the time of leaving home; and
3. All court involvements, including whether the runaway is subject to the family court's jurisdiction.

Where a minor is from out-of-state, reference should be made to the table that follows for the age at which minors are no longer considered runaways in the home state. If the minor is involved in a family court proceeding, or has left placement, the minor's family court attorney should be contacted for advice.

Table

STATE	AGE	STATUTORY CITATION
Alabama	18	Ala. Code, § 12-15-1(3) (1989)
Alaska	18	Alaska Statutes, § 47.10.010(a) (1988)
Arizona	18	Ariz. Rev. Statutes Ann., § 8-201(6) (1989)
Arkansas	18	Ark. Code of 1987 Ann., § 9-27-303 (1988)
California	18	Cal. Wel. & Inst. Code, § 601 (1989)
Colorado	18	Colo. Rev. Stat., § 19-1-103(2) (1988)
Connecticut	16	Conn. Gen. Stat. Ann., § 46b-120 (1988)
Delaware	18	Del. Code Ann., T.10, § 901(3) (1988)
Wash., D.C.	18	D.C. Code Ann., § 16-2301(3) (1988)
Florida	18	Fla. Stat. Ann., § 39.017 (1988)
Georgia	17	Ga. Code Ann., § 15-11-2(2) (1989)
Hawaii	18	Hawaii Rev. Stat., § 571-2 (1984)
Idaho	18	Idaho Code, § 16-1802(c) (1989)
Illinois	18	Ill. Ann. Stat., C.37, § 803-3 (1989)
Indiana	18	Ind. Code Ann., § 31-6-1-2 (1989)
Iowa	18	Iowa Code Ann., § 232.02(5) (1989)
Kansas	18	Kan. Stat. Ann., § 38-101 (1986)
Kentucky	18	
Louisiana	17	Code of Juvenile Procedure, Art 13(9) (1989)
Maine	18	Me. Rev. Stat. Ann., T.15, § 3003(14) (1988)
Maryland	18	Md. Cts. & Jud. Proc. Code Ann., § 3-801(d)(1988)
Massachusetts	17	Ma. Ann. Laws, C.119, § 72 (1989)
Michigan	17	Mich. Stat. Ann., § 25:244(1)
Minnesota	18	Minn. Stat. Ann., § 260.015(20) (1989)
Mississippi	18	Miss. Code Ann., § 43-21-105(d) (1988)
Missouri	17	Mo. Ann. Stat., § 211.021(2) (1989)
Montana	18	Mont. Code Ann., § 41-5-103(11) (1987)
Nebraska	18	Neb. Rev. Stat., § 43-245(5) (1988)
Nevada	18	Nev. Rev. Stat., § 62.020(2) (1988)
New Hampshire	18	N.H. Rev. Stat. Ann., § 169-D:2(I) (1988)
New Jersey	18	N.J. Stat. Ann., § 2A:4A-22(a) (1988)
New Mexico	18	N.M. Stat. Ann., § 32-2A-3(a) (1988)
New York	16	N.Y. Fam. Ct. Act, § 718 (1989)
North Carolina	16	N.C. Gen. Stat., § 7A-517(28) (1988)
North Dakota	18	N.D. Cent. Code, § 27-20-02(1) (1989)
Ohio	18	Ohio Rev. Code Ann., § 2151.011(B)(1) (1988)
Oklahoma	18	Okla. Stat. Ann., T.10, § 1101(1) (1989)

Oregon	18	Or. Rev. Stat., § 419.476(1) (1987)
Pennsylvania	18	Pa. Stat. Ann., T.42, § 6302(1) (1983)
Rhode Island	18	R.I. Gen. Laws, § 14-1-3(C) (1988)
South Carolina	18	S.C. Code Ann., § 20-7-30(1) (1988)
South Dakota	18	S.D. Codified Laws Ann., § 26-8-1 (3) (1989)
Tennessee	18	Tenn. Code Ann., § 37-1-102(4)(A) (1988)
Texas	17	Tex. Fam. Code Ann., § 51.02 (1989)
Utah	18	Utah Code Ann., § 78-3a-2(3) (1989)
Vermont	18	Vt. Stat. Ann., T.33, § 632(1) (1984)
Virginia	18	Va. Code, § 16.1-228(D) (1989)
Washington	18	Was. Rev. Code Ann., § 13.32A.030(2) (1989)
West Virginia	18	W. Va. Code, § 49-1-2 (1989)
Wisconsin	18	Wis. Stat. Ann., § 48.02(2) (1988)
Wyoming	19	Wyo. Stat., § 8-1-102(a)(iii)(B) (1989)
Puerto Rico	18	P.R. Laws Ann., T. 34, § 2203(n) (1988)

Marriage

Minors Below 14

Minors below age 14 may not get married in New York. *Domestic Relations Law* § 15-a.

Minors Between 14 and 16

Minors 14 or 15 years of age may marry, but only with permission of both their parents and the family court. The minor's parents must petition the family court and convince the judge that the marriage would be in the minor's best interests. *Domestic Relations Law* § 15. Most commonly, such permission is sought when a minor is pregnant or has a child and seeks to marry the father, or when the minor is a father or father-to-be.

Minors Between 16 and 18

Minors between 16 and 18 may marry, but only with the permission of both parents, although there are exceptions where the consent of one parent is sufficient. *Domestic Relations Law* § 15. The requirement of consent of *both* parents can be waived if, for example: (1) a parent has been missing for one year, (2) the marriage of the parents has been dissolved, in which case the parent awarded custody must consent, or (3) the parent has been adjudicated an incompetent. *Domestic Relations Law* § 15.

Persons Over 18

Persons 18 and over may marry without parental consent. *Domestic Relation Law* § *15.*

Minors Married Out-of-State

Minors married in other states are usually considered legally married in New York as long as the marriage was legal in the state in which it was performed, even where the marriage would not have been allowed in New York. For example, assume State X allows 17-year-olds to marry without parental consent. Then two 17-year-olds from New York travel to State X and marry without parental consent, if they then return to New York, their marriage would be recognized by New York as legal and valid.

Illegal Marriages Generally

The marriage of a minor in New York obtained without parental consent or by presenting false evidence of age is *valid* in New York, unless and until the marriage is declared void by a court. This is true even though the marriage should not have been performed in the first place. In deciding whether to declare such a marriage void, a could would look to all of the facts and circumstances surrounding the marriage. *Domestic Relations Law* § 7.

Paternity Proceedings

Introduction

What happens when a minor mother with a child born out of wedlock seeks to legally establish the identity of the father? Or when a young man seeks to establish that he is the father of a child born out of wedlock? In both of these situations, one would seek to establish the paternity of the child. Establishing paternity is the legal process by which the father of a child born out of wedlock is identified and the father thereby becomes legally responsible for the child. This can be done by the father voluntarily admitting paternity, by the mother bringing a paternity proceeding against the alleged father (putative father), by the Department of Social Services bringing a paternity action against the putative father on behalf of a mother who receives public assistance, or by the putative father bringing an action to establish that he is the father of a child born out of wedlock. *Family Court Act* § 522.[30] Once paternity is established, the father could seek visitation or custody of the child, and will be required to contribute support for the child.

Time for Bringing Paternity Action

The time within which a paternity proceeding must be brought is somewhat complicated and depends on who seeks to establish paternity. Anyone who wishes to establish paternity should not wait.

Paternity proceedings are instituted by the filing of a petition in the family court. The person filing the petition is called the petitioner; the person against whom the petition is filed is called the respondent. The family court personnel will assist the petitioner in completing the papers. It does not cost any money to institute a paternity proceeding.

Hearing

A hearing is conducted by the family court. Both the petitioner and respondent are entitled to be represented by attorneys and should have attorneys appointed by the court if they cannot afford to hire one. *Family Court Act* § 262. While the hearings, which are like trials, used to be quite important in determining paternity, they are less so today because of sophisticated blood grouping tests which can establish, with up to 99% accuracy, whether a particular male is the father of a particular child. These blood tests are called the human leucocyte blood tissue test (HLA test).

Order of Filiation

If the court determines the putative father to be the natural father of a child born out of wedlock, it will enter an order of filiation. The court, as part of the order, will require the parent or parents to pay a reasonable amount of support for the child if they are possessed of sufficient means to do so, or are able to earn income. *Family Court Act* §§ 542, 545. The family court may also enter an order permitting visitation of the child. *Family Court Act* § 549.

Where one parent is being harassed by another, the court is also authorized to enter orders of protection (see *Domestic Relations Law* § 551; see also "Family Offense Proceedings").

Acknowledgment of Paternity

The need for court proceedings can be avoided entirely if the father signs an acknowledgment of paternity. He must sign the acknowledgement before a notary public and no other witnesses are necessary. An acknowledgment is legally binding and, based on it, the father could be required to pay support and would have rights of visitation.

Summary

By establishing paternity, a young woman establishes the legal identity of the father of her child. This is important because the father can be required to contribute support for the child. While a young woman on public assistance may not view this as particularly important, she should be cautioned that she may not be on public assistance for her whole life. Thus, at some future date, support from their child's father might be quite valuable. By the same token, the young woman who wishes to establish paternity must be advised that the father probably will be granted the right to visit the child (see "Visitation") or could ask for custody of the child.

---

[30] This is not an exclusive list of who may bring paternity actions.

A young man who has a child born out of wedlock probably has few legal rights regarding the child unless paternity is established. Certainly the young man would not be entitled to custody, and may not be entitled to visitation unless paternity is established. The young man who wishes to establish paternity must understand that with the rights of fatherhood come responsibilities, and that he may be required to contribute support for the child if financially able to do so.

Custody

Introduction

The issue of custody when it concerns minors can come up in two contexts. One is the right of a minor to determine in whose custody he or she will be placed. The second is the right of the minor to custody of his or her own child. We discuss both matters in this section

Custody of a Minor Between Parents

Minors who are the object of a custody dispute frequently ask if they can determine with which parent they will be placed. The simple answer is that, while a judge may ask the opinion of the minor, the opinion of a minor, will not be dispositive of who will be granted custody. Thus, if the minor expresses a preference for one parent, but the court deems that the best interests of the minor will be served by placement with the other parent, the wishes of the minor will not be honored.[31] This would apply to a change in custody as well, although the prior award of custody by agreement or court decision will be given weight.[32]

For a discussion of whether a minor may reject the custody of both parents and, in effect, be in his or her own custody (see "Emancipation," "Runaways" and "PINS").

Minors' Right to Custody of Their Child

Generally: Parents, including minor parents, have a superior right to custody over all others.[33] The fact that a parent is a minor does not deprive him/her of any parental rights.

Rights of Custody Between Minor-Parents: Neither a mother or a father has a superior right to custody of their child. If the child is born out of wedlock, a father would have to establish paternity before he could claim custody. (This should be done as soon after the child's birth as possible.) The sole criteria that a court will use in awarding custody of a child between parents is what it deems to be in the best interests of the child. It does not matter that both parents are minors, or that one parent is a minor and the other is an adult. The court's concern will center on who is best able to care for the child, and how the child's best interest will be served by the award of custody.[34] Custody decisions are not final and custody can be taken from one parent and given to another based on changed circumstances.

Minors' Right to Custody Against Non-Parents: Parents, including minors, have a superior right to custody of their children against non-parents, including the grandparents of the child (i.e., the parents of the minor). Parents of minor-parents often assume that because they have custody over the minor-parent, they have custody over the minor-parent's child as well. This is simply not true. Unless the minor-parent has voluntarily placed her child in foster care, or a judicial decision has been made that the minor parent is unfit, no person or agency has the right to custody of a minor's child.[35]

---

[31] Ebert v. Ebert, 38 N.Y.2d 700 (1976).

[32] Nehra v. Uhlar, 43 N.Y.2d 242 (1977).

[33] Merrit v. Way, 58 N.Y.2d 850 (1983).

[34] New York Domestic Relations Law § 70.

[35] Merrit v. Way, *supra*.

Visitation

Introduction

Once the identity of a child's parents is established and custody awarded, the noncustodial parent has the right to seek visitation. Where the child is the product of a marriage that has ended, there is no need to establish paternity because it is presumed that the husband is the child's father. Where the child is born out of wedlock, a father may have to establish paternity before exercising visitation rights. It is important to note that the minor does not have the power to refuse visitation with the noncustodial parent unless exceptional circumstances are presented.

Child Born in Wedlock

As one court has stated,

> [A] parent may not be deprived of his or her right to reasonable and meaningful access to the children by marriage unless exceptional circumstances have been presented to the court. The term "exceptional circumstances" or "exceptional reasons" is invariably associated with a situation where either the exercise of such right is inimical to the welfare of the children or the parent has in some manner forfeited his or her right to such access.[36]

In other words, there is a very strong presumption that the noncustodial parent should be allowed to visit the children of a marriage that ends in divorce. Moreover, this right to visitation does not depend on the children consenting to or requesting the visitation. "While the children's wishes should be given consideration, their wishes are not necessarily determinitive."[37] The custodial parent must understand that, as a general matter, he or she does not have the power to deny, or even dictate the terms of visitation. A parent who refuses to permit visitation may forfeit the right to support payments for the child from the noncustodial parent.[38]

Children Born Out of Wedlock

A father probably does not have a legally enforceable right to visit a child born out of wedlock unless the father acknowledges paternity of the child or an order of filiation is entered by the family court (see "Paternity"). However, once a father acknowledges paternity or an order of filiation is entered, the father would have the right to seek visitation of the child. The mother, under these circumstances, would not have the right to refuse visitation.[39] The father would also be required to contribute to the support of the child if possessed of sufficient means.

Grandparent Visitation

Section 72 of the Domestic Relations Law sets forth a procedure whereby a grandparent can obtain a court order allowing visitation of a grandchild. The decision whether or not to permit visitation rests within the discretion of the court "and must, in the final analysis, be determined in the light of what is required in the best interests of the child or children."[40]

---

[36] Strahl v. Strahl, 66 A.D.2d 571, 414 N.Y.S.2d 184, 186 (2d Dept. 1979), *aff'd* 429 N.Y.S.2d 635 (1980); See also Entwistle v. Entwistle, 61 A.D.2d 380, 402 N.Y.S.2d 213 (2d Dept. 1978); Sipos v. Sipos, 73 A.D.2d 1055, 425 N.Y.S.2d 414 (4th Dept. 1980).

[37] Strahl at 188. See also Sturn v.Lyding, 96 A.D.2d 731, 465 N.Y.S.2d 347 (4th Dept. 1983) (denial of visitation could not be based on the refusal of a 12-year-old to visit noncustodial parent).

[38] Borax v. Borax, 172 N.Y.S.2d 805 (Ct. App. 1958).

[39] Joye v. Schechter, 460 N.Y.S.2d 992 (Fam. Ct. Nassau Co., 1983).

[40] Lo Presti v. Lo Presti, 387 N.Y.S.2d 413, 415 (Ct. App. 1976).

Summary

Minor-mothers who are divorced or separated must understand that the father has a right to visitation. If the child was born out of wedlock, this right could be exercised after paternity is established. By the same token, minor fathers should understand that they have the right to visitation with their children once paternity is established. If their child is born out of wedlock, the father may have to establish paternity (see "Paternity").

The right of parental visitation will be refused only if the custodial parent can prove that it would be harmful to the child. This could include, for example, that the mother fears that the father will "run off" with the child. However, the mother's "feelings" are not enough; there must be some proof of the allegation. Where there is no "proof" of possible harm to the child, the custodial parent probably should not seek to totally bar visitation, but rather should seek to have the visitation "supervised" by others. A court will be much more likely to order supervised visitation than no visitation at all.

Last, the fact that an older minor does not wish to visit the noncustodial parent will not necessarily result in denial of visitation. As a practical matter, however, there is little a court can do to force an older adolescent to visit a parent against the minor's wishes.

Foster Care-Voluntary Placement

Introduction

Children in foster care are placed in residences other than their parents' homes through the auspices of state or local government or their designated agents. Such residences include institutions, group homes, unrelated families or even relatives. By foster care, we do not mean unofficial placements effected by the parents themselves, for example a mother leaving her child with a grandmother. In New York State, there are three ways in which a child may be placed in foster care -- voluntary placement by the parents, a surrender of the child for adoption (see "Adoption") and placement by the state where a child has been found to be or is alleged to be maltreated (see "Child Maltreatment"). In this section we discuss voluntary placement.

Voluntary Placement

Voluntary placement occurs when a parent, for one reason or another, is unable to care for a child. This could include, for example, illness of the parent or loss of housing. Voluntary placement is viewed as a temporary measure limited to the duration of parental incapacity.

The term "voluntary placement," however, can be misleading. If the parent does not take adequate steps to regain the child from placement within a reasonable amount of time, or fails to takes steps in that direction, the child care agency may take steps to terminate the parent's rights (see "Termination of Parental Rights"). Under these circumstances, the parents seeking to end the "voluntary placement" may find themselves faced with a court proceeding to determine whether their custodial rights should be terminated and the child freed for adoption. Thus, the reader is advised to review this section thoroughly to become aware of the ramifications of voluntary placement.

It is very important that a parent who considers voluntary placement of a child be adequately apprised of his or her obligations. In this regard, legal counseling is recommended before any documents are signed by the client. Moreover, you should always consider what steps may be taken to prevent the need for foster care and to preserve the natural parents' home environment. This is especially important when working with pregnant teenagers and could include the provision of preventive services under the Child Welfare Reform Act of 1979. Indeed, the state has an affirmative obligation to provide services so that families remain intact.

A parent voluntarily places a child by entering into a written agreement with the Department of Social Services. This agreement is very important and should not be signed until it is reviewed with an attorney or other professionals experienced in the foster care area. The agreement is the "contract" between the parent and the Department of Social Services ("DSS"). It must set forth at least the following:

- legal representation (including a list of attorneys or organizations which provide free legal services);
- that the parents had no legal obligation to place the child and will incur no legal sanction for failing to do so;
- that the law permits the agreement to specify a date or an identifiable event upon which the child is to be returned;
- that if no date or event is specified, then the parent has the right to return of the child within 20 days of a request for return, unless otherwise ordered by the court;
- that the parents have the right to supportive services;
- that the parent will determine jointly with the agency the term and frequency of visitation;
- that the parent has the obligation to visit the child, to plan for the future of the child, to meet and consult with the child care agency regarding such plan, to contribute to the support of the child if able, and to inform the agency of any change in name or address;
- that the failure of the parent to meet these obligations could be the basis for a court proceeding to terminate the parent's rights; and
- that the parent has the right to consult with an attorney.

Social Services Law § 384-a.

At the time that the agreement is signed, the parent is entitled to receive a parents' rights handbook and a copy of the form on which the parent may request that the child be returned from placement. We strongly recommend that the agreement recite precisely the time when placement will end, or the event upon which placement will end. DSS, or its authorized agencies, should not refuse to make reasonable modifications to any pre-printed forms. We also recommend that the agreement recite the assistance to be provided to the parent by the authorized agency to help effect reunion of the family. Last, we again stress that the agreement be reviewed with a lawyer prior to signing.

Once the agreement is executed, DSS must file it with the family court within 30 days of the date that the child is placed out of the home. *Social Services Law* § 358-a. Oftentimes, there is a significant time between the filing of the agreement and actual review by the family court. The family court must then conduct a hearing to assure that the consent of the parent was voluntary and informed. The court should also determine whether reasonable efforts were made prior to placement to prevent the need of removal of the children from the home. The law permits parents to waive their appearance at this hearing by signing an appropriate consent form. We strongly recommend against parents waiving their appearance at the court hearing.

The family court judge, in granting the petition, may issue an order requiring the implementation of a specific plan by the Department of Social Services to exercise diligent efforts toward the discharge of the child from care, either to his or her own home or to an adoptive home. Prior to the hearing, the child care agency is required to file supplemental information regarding the child's stay in foster care, and the assessment of the child and his or her family circumstances performed by the agency.

Once a child is in foster care, state law requires a periodic family court review every 18 months. However, at the time of the initial placement, the family court may order that the review take place earlier. The court should review (i) the appropriateness of the plan for foster care, (ii) the services that have been offered to strengthen and re-unite the family, (iii) what efforts have been made or should be made to evaluate or plan for other modes of care when return of the child home is unlikely, and (iv) any further plans or efforts made or to be made to promote the best interest of the child.

As a result of the hearing, the court may:

- order that foster care be continued;
- return the child to the parent;
- order the agency to institute proceedings to free the child for adoption;
- order that the child care agency undertake diligent efforts to encourage and strengthen the parental relationship, if not detrimental to the best interest of the child.

Social Services Law § 392.

Return of Child from Voluntary Placement

The child should be returned to the parents within 10 days of the date set forth in the agreement or within 10 days of the occurrence of the event set forth in the agreement. The child care agency may, however, seek to prevent return of the child by filing a court action in which the court will determine whether return of the child would be in his or her best interests.

The parents may request that the child be returned before the date or event set forth in the agreement. This request should be answered by the agency within 10 days. If the agency refuses the parents' request, or simply does not respond, the parents may go to family court or supreme court and file a writ of habeas corpus to seek return of their child. At the hearing to consider the parents' request, the court would consider whether the return of the child would be in the child's best interests.

Where a voluntary placement agreement does not contain a date or event on which the child is to be returned, the parents may request the return of their child at any time. The agency must respond to the request within 20 days. If the agency deems the return of the child to be contrary to the child's best interests, the agency is permitted to go to family court to attempt to block the return of the child. Again, the standard would be the best interests of the child.

Clients who voluntarily place their children must understand their obligations, and that failure to meet these obligations could be used as a basis for terminating their parental rights. First, they must visit the child. In this regard, the agency should establish visitation as often as the parent desires. The frequency of visitation should be set forth in the voluntary placement agreement so that it cannot be reduced by the agency without a court order. If the client cannot visit the child for some reason (e.g., illness or incarceration), contact must be maintained with the child. This includes phone calls and letters on a regular basis. If a parent is in prison, the proper authorities must be contacted to arrange for visitation at the prison on a regular basis.

The client must also make both short-term and long-term plans for the return of the child from foster care. If the problem is that the client is destitute, an application should be made for public assistance. If the client is homeless, steps must be taken to secure a home. This could include, for example applying for public housing. If the client has a physical problem, medical attention should be sought. If the client feels psychologically unfit to care for the child, counseling must be obtained immediately.

We suggest all of these steps so that the parent will not risk losing his or her child. Again, while the use of voluntary placement can be quite beneficial, the parent must meet his or her obligations *viz-a-viz* the child in placement. Although the agency is required to assist the parent in taking these steps, it is not enough to rely on the agency. A positive result will depend on the client following through with the efforts necessary to regain custody and to prevent termination of parental rights.

Child Maltreatment

Introduction

The problem of child maltreatment is one that is receiving increasing attention, and one with which the service provider must be familiar in order to carry out the reporting requirements mandated by law. For persons working with adolescents, the issue of abuse arises in the context of the maltreated teenager, and, where the teenager is a parent, in the context of the teenager as a possible child abuser. In this section, we discuss child abuse, child neglect, and the family court process where a parent is alleged to have maltreated a child. The procedures for mandated reporting are discussed below.

Definition of Abuse

In New York State, an abused child is defined as a person *under 18* years of age who, under *nonaccidental circumstances*, has been *seriously* injured, or threatened with considerable likelihood of *serious injury*, by his *parent* or that person *legally responsible* for his care. *Family Court Act* § 1012. The term nonaccidential may include serious injuries which are caused by the reckless behavior or neglegent supervision of a parent. Thus, even where a parent did not intentionally mean to injure a child, if the circumstances are such that the injury could have been reasonably foreseen, abuse could be found.

The term "person legally responsible for care" is defined as any person who is in the household at regular intervals or on a continuous basis and could include guardians, custodians, paramours, common law spouses or even babysitters. *Family Court Act* § 1012. Hereafter, the term parent will include "person legally responsible for care" as well.

New York State has defined *serious injury* as any of the following:

1) Where the parent inflicts or allows to be inflicted an injury which creates the *substantial risk* of death. A substantial risk of death is the real and considerable likelihood of its occurrence. It is not a mere possibility or suspicion;
2) Where a parent inflicts or allows to be inflicted a serious or protracted disfigurement (burns, scars, etc.);
3) Where a parent inflicts or allows to be inflicted a protracted impairment of physical health (broken bones, a lengthy illness due to injuries inflicted, etc.);
4) Where the parent inflicts, or allows to be inflicted, the loss or impairment of the function of any bodily organ (eye, ear, internal organs, etc.);
5) Where the parent inflicts or allows to be inflicted a protracted impairment of emotional health (defined as substantially diminished psychological or intellectual functioning *clearly attributable* to the unwillingness or the inability of the parent to exercise a minimum degree of care toward the child); or
6) Where the parent commits or allows to be committed a sex offense upon the child.

Family Court Act § 1012.

Generally serious injuries must occur before abuse will be found. However, a court will often find neglect where the injuries are not sufficient to establish a finding of abuse. For example, one court found that 26 black and blue marks on the back of a seven-year-old, inflicted while he was wearing underwear, did not constitute abuse as the injuries were not life threatening and did not cause permanent disfigurement.[41] However, the court did find that the child was neglected (to be discussed below). Generally, excessive corporal punishment is treated by the courts as neglect.

The statute also permits a finding of abuse where the parent is an onlooker (i.e., permits the abuse to occur) or is simply unable to adequately care for the child and, thereby, causes psychological harm to the child. *Family Court Act* § 1012. A court, however, would likely to find neglect rather than abuse in these situations.

A parent need not *actually* inflict serious injury upon the child for there to be abuse. Abuse also occurs where the parent creates a substantial risk of the injuries defined in 1-5 above. If the injuries are not serious, as defined by the law, but the manner of infliction created the substantial risk of serious injury, then abuse could be found. For example, the father who throws his young child against a wall without causing serious injury could be found to have committed abuse.

The determination whether a parent's conduct has caused such a "protracted impairment of the emotional health" of the child that it should be considered abuse is a difficult one indeed. Such a decision should not be made without consulting a psychiatrist or psychologist qualified to assess the psychological or intellectual functioning of a child. Practically speaking, a court would probably find neglect, rather than abuse in such a situation.

---

[41] Matter of Rodney C., 398 N.Y.S.2d 511 (Fam. Ct. Onondaga Co., 1977).

Definition of Neglect

A neglected child is a person of *less* than 18 years whose *physical, emotional*, or *mental* condition has been impaired, or is in imminent danger of being impaired, as a result of the parent's:

1) failure to provide the child with adequate food, clothing or shelter; or
2) failure to secure the child's attendance at school as required by the compulsory school law; or
3) failure to provide the child with proper guardianship by the infliction of excessive corporal punishment or misuse of drugs and/or alcohol to the extent that he loses self-control, or other serious acts which may require court intervention; or
4) abandonment of the child (usually failure to visit the child for 6 months); or
5) failure to provide medical, dental, surgical, or orthopedic care, although financially able to do so.

Family Court Act § 1012.

The failure to provide adequate food, clothing or shelter, listed as the first basis of neglect, is self-explanatory. We note, however, that a parent who is financially unable to provide food, clothing and shelter would not be considered neglectful, unless the parent refused, for example, to apply for public assistance to cure such a problem.

Failure to secure one's child's education, listed as the second ground for neglect, is more complicated. Failure to secure an education has included: (1) a refusal to send a child to school from Wednesday afternoon to Thursday morning due to observation of the Sabbath;[42] (2) refusal to immunize a child, thereby rendering him ineligible for school;[43] or (3) the provision of home instruction that was not the equivalent of the public school education.[44] (See "Compulsory Education.") If the *child* refuses to attend school, a court would most likely find the child to be a "person in need of supervision" rather than find the parent guilty of neglect. (See "Person in Need of Supervision.")

Excessive corporal punishment, listed as one of the grounds for neglect, has included, for example: (1) forcing a child to remain in a contorted position, thereby causing vomiting and pain;[45] and (2) beating a child and thereby causing 26 black and blue marks.[46] The determination of what constitutes excessive corporal punishment can be difficult because different cultures have different attitudes about permissible degrees of corporal punishment. The service provider must be sensitive to these differences and differentiate between personal attitudes regarding corporal punishment, and the use of corporal punishment to the extent that there would be some broad censensus on its excessiveness.

A child born with drug withdrawal symptoms may be presumed to be neglected. A parent's status as a drug addict or severe alcoholic would probably be presumed neglect of the child. Where the parent, however, is voluntarily and regularly participating in an substance abuse program, the fact that the parent has repeatedly been a substance abuser to the extent of losing self-control will not constitute neglect unless the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired. *Family Court Act* § 1012.

---

[42] In re Currence, 248 N.Y.S.2d 251 (Fam. Ct. Kings Co., 1963).

[43] In re Elwell, 284 N.Y.S.2d 924 (Fam. Ct. Dutchess Co., 1967); see "Minors and School - Immunization."

[44] In Matter of Franz, 55 A.D.2d 424, 378 N.Y.S.2d 317, aff'd, 390 N.Y.S.2d 940 (2d Dept. 1977).

[45] Matter of Rodney C., 398 N.Y.S.2d 511 (Fam. Ct. Onondaga Co., 1977).

[46] See case cited in Footnote 41.

A parent's failure to provide the child with proper supervision due to "serious acts which may require court intervention" is a catch-all provision which has included: (1) living with a paramour;[47] (2) adultery;[48] (3) leaving one's child at home unattended;[49] (4) compelling a child to distribute religious literature at all hours of the day;[50] (5) arguments between spouses due to mother's affiliation to the Communist Party;[51] and (6) a father's refusal to surrender his automobile license in order to obtain public assistance.[52]

However, courts have determined that the mere application for public assistance, or education in the ideology of communism, or allowing one's child to become overweight did not constitute neglect.[53] The provision which allows a finding of neglect due to "inadequate supervision," while perhaps necessary, could also be subject to misuse because it necessarily involves subjective judgments. Again, the service provider is cautioned to differentiate between personal values, and those values upon which there is broad societal consensus. The case referred to above, where parents were accused of neglect for educating their children in communism is a good example of an abuse of this provision.

Abandonment, listed as the fifth ground for neglect, is the failure for a period of six months to visit or communicate with the child or person having custody although able to do so. *Family Court Act* § 1012. The law presumes the parent could visit or communicate unless proven otherwise (see "Termination of Parental Rights").

Failure to provide medical care, the last ground listed for neglect, has included, for example: (1) the refusal by a Jebovah's Witness to consent to a son's blood transfusion needed for an operation;[54] and (2) the refusal to permit medical or dental care of a child who was suffering from an umbilical hernia, cavities, and fractured teeth.[55] However, such failure did not include a parent's choice to have his son who was suffering from Hodgkin's disease, undergo nutritional therapy rather than chemical therapy as recommended by the hospital.[56] The failure to provide medical care includes nonemergency as well as emergency situations.

As is readily discernible, neglect can be found in a wide variety of circumstances. Some of the findings summarized above may involve violations of certain constitutional rights of the parents; for example, the state's intervention where the parents attempted to exercise certain religious beliefs in the education and medical treatment of their children. In those situations, the state's interest in the education and health of the child outweighed the parents' exercise of their religious beliefs. However, the line must be considered a fine one.

New York's legislative scheme is somewhat inconsistent. Abuse has been defined in a manner that severely curtails the state's intervention into the family. The definition of neglect however, remains very broad. Yet the court has the power to impose the same remedial measures in both abuse and neglect cases (except where severe and repeated child abuse is proved). Thus, although the court's intervention may be based on a finding of neglect, rather than on a more serious finding of abuse, the same remedial measures may still be imposed. There are, however, at least two differences which may distinguish abuse findings from neglect findings. A finding of severe and repeated child abuse could lead to the permanent termination of parental rights. Second, persons subject to child abuse proceedings may also be prosecuted in the criminal court.

---

[47] Matter of Tesch, 322 N.Y.S.2d 538 (Fam. Ct. Wayne Co., 1971).

[48] In re Anonymous, 238 N.Y.S.2d 422 (Fam. Ct. Rensselaer Co., 1962).

[49] In re Eric M., 90 A.D.2d 717, 455 N.Y.S.2d 780 (1st Dept. 1982).

[50] Hunter v. Power, 135 N.Y.S.2d 371 (Chil. Ct. Bronx Co. 1954).

[51] In re Dubin, 112 N.Y.S.2d 267 (Dom. Rel. Ct. 1952).

[52] In re Kinney, 272 N.Y.S. 520 (Chil. Ct. Otsego Co. 1934).

[53] Hunter v. Powers, *supra.*; In re Joffe, 33 N.Y.S.2d 481 (Dom. Rel Ct. Bronx Co. 1942).

[54] In re Sampson, 323 N.Y.S.2d 253 (3d Dept. 1971), *aff'd*, 328 N.Y.S.2d 686 (Ct. App. 1972).

[55] Matter of Gregory S., 380 N.Y.S.2d 620 (Fam. Ct. Kings Co., 1976).

[56] Matter of Hofbaurer, 411 N.Y.S.2d 416 (3rd Dept. 1978), *aff'd*, 419 N.Y.S.2d 936 (1979).

Who Must Report

New York State places an affirmative obligation upon certain persons to report cases of suspected child maltreatment to a centralized agency of the State Department of Social Services. *Social Services Law* § 413. Those persons include:

> physicians; surgeon; medical examiner; coroner; dentist; osteopath; optometrist; chiropractor; podiatrist; resident; intern; psychologist, registered nurse; hospital personnel engaged in the admission, examination, care or treatment of persons; a Christian Science practitioner; school official; social services worker; day care center worker; provider of family or group family day care; employee or volunteer in a residential care facility defined in subdivision seven of section four hundred twelve of the Social Services Law or any other child care or foster care worker; mental health professional; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official.

The report must be made when these professionals reasonably suspect that a child coming before them in their official capacity is abused or neglected. These same professionals also must file a report when they have reasonable cause to suspect that the child is abused or neglected if a parent has come before them in their official capacity, and stated, from personal knowledge, facts, conditions or circumstances which, if true, would constitute abuse or neglect. *Social Services Law* § 413. In addition, any person may report a case of a suspected abuse or neglect. Readers should be familiar with their agency child abuse and neglect protocol.

Client Confidentiality

In New York State, certain professional/client relationships are generally protected by a privilege; that is the professional cannot be forced to disclose statements or conversations made in connection with treatment (see "Confidentiality"). The privilege is intended to foster the spirit of trust and openness between the professional and the client which is considered necessary for meaningful treatment. In the area of child abuse, however, the need to protect children is deemed more important and the persons listed above must file a report in spite of any general notions of confidentiality.

Liability for Making a Report

New York State grants immunity from criminal or civil liability to any person who, in *good faith*, reports a case of child abuse or neglect. Therefore, absent reports made solely for the purpose of harassment, legal liability for a mistaken report should not be a problem. *Social Services Law* § 419. It is a good practice to record the factual basis on which the report was made.

Failure to Make a Required Report

Any person, required to report a case of child abuse or neglect, who willfully fails to do so could be found guilty of a class A misdemeanor. The person may also be subject to a civil lawsuit for damages proximately caused by the failure. This means that if, at the time the person suspects child abuse, one could reasonably foresee that the child abuse would again occur if not reported, and it actually does and causes injury, the person may be liable. *Social Services Law* § 420.

The Process After a Report is Made

After a report is made to the state registry, an investigation should be begun by the local child protective agency within 24 hours. In those cases where the parent refuses to cooperate with the investigation, the local social services agency is empowered to file a petition in the family court. The family court has exclusive jurisdiction over child protective proceedings, although child abuse/maltreatment is also punishable in criminal court. *Family Court Act* §§ 1013, 1014.

In determining whether the family court has jurisdiction, the age of the child at the time that the proceedings are initiated controls. *Family Court Act* § 1013. Thus, if the child is 18 or over at the time a petition is filed with the court, the case must be dismissed even though the abuse occurred before the child reached 18. (But the child may file a family offense proceeding in the family court. See "Family Offense.") The child does not have to actually be in the care or custody of the abuser for the court to exercise its power. Finally, the fact that the abuser is being tried in criminal court for the same acts does not preclude the family court from acting. A person charged with abuse or maltreatment can be tried in criminal court *and* brought before the family court concurrently.

Emergency Situations

A peace officer or other designated persons may remove an abused or maltreated child from the home with parental consent. If the parents refuse to consent (which must be in writing), or are not present, the family court may enter an order temporarily removing the child from the home if:

(1) the child appears to be suffering from abuse or neglect;

and

(2) removal is necessary to avoid imminent danger to the child's life or health;

and

(3) there is not enough time to file a petition and hold a preliminary hearing before the family court.

Family Court Act § *1022.*

When there isn't time to obtain a court order, a peace officer, a law enforcement official, or certain designated persons may take a child into custody without the consent of the parents if:

(1) if the child is in such circumstances that his continuing presence in the home presents an imminent danger to the child's life or health;

and

(2) there is not enought time to pursue the procedure described above.

Family Court Act § 1024.

Physicians may keep a child in custody if the above criteria are met. When the physician does this as a member of the staff of a hospital, he or she must notify the head of the institution who shall then assume responsibility. The physician has the right to keep the child until the custody of the child is assumed by the local department of social services or appropriate law enforcement officials. *Family Court Act* § 1024.

Persons using this procedure must:

(1) take the child to a place designated by the court unless the person is a physician *and* the child is or will be admitted to a hospital;

and

(2) make every reasonable effort to inform the parent of the facility to which the child has been brought;

and

(3) inform the family court.

Family Court Act § 1024.

Imminent, for purposes of the emergency procedures means that the harm is likely to occur without delay. A person or institution removing a child or retaining custody of a child has immunity from civil or criminal liability if such actions were taken in good faith. The law, therefore, encourages persons to make this decision without regard to lawsuits. *Family Court Act* § 1024.

When a child is removed from the home without the consent of the parents, as described above, a child maltreatment petition must be filed with the court within 3 days. The family court may also authorize a physician or hospital to provide emergency medical or surgical proceedings.

Last, the family court is empowered to order the removal of a child at any time after filing of an abuse or neglect petition if such removal is necessary to avoid imminent risk to the child's life or health.

What Does the Family Court Process Look Like?

PETITION FILED IN FAMILY COURT

The petition is simply the court document filed by the child protective agency which alleges in numbered paragraphs that abuse/neglect has occurred. The petition must adequately notify the parent of the time, place and nature of the abuse.

TEMPORARY REMOVAL HEARING

This is a preliminary hearing where the most important consideration is whether the child should be removed from the home pending the full hearing. The court must make a written finding in support of the temporary removal. The parent is often not present at this hearing. If the child is removed from the home, the parent has the right to demand a hearing before a judge to determine if the removal was warranted.

INTAKE PROCEEDINGS

All parties come before the court. A law guardian is appointed for the child if one has not already been appointed. The parents are advised of the allegations in the petition and of the right to an adjournment to seek counsel. If the parents cannot afford counsel, an attorney will be appointed by the court. If their child has been removed from the home, the court will advise the parents of their right to a hearing to seek the child's return. Some cases are adjourned in contemplation of dismissal at this point, also, the judge may order psychiatric examinations.

FACT-FINDING HEARING

Court decides whether there is sufficient competent evidence to make a finding of abuse or neglect.

DISPOSITIONAL HEARING

This stage occurs only if there has been a finding of neglect or abuse. The various dispositions which a judge may order are described later in this section.

A child maltreatment proceeding is filed in the family court. The parents have the right to be represented by an attorney and, if they cannot afford one, one must be appointed by the court. *Family Court Act* § 262. Child protective proceedings have specialized rules of evidence designed to search out the truth. *Family Court Act* § 1046. In order to sustain a finding of abuse or neglect, the state must demonstrate that it is more likely than not that abuse or neglect has occurred. (In contrast, in criminal proceedings, guilt must be established beyond a reasonable doubt.)

Proof of the abuse or neglect of one child can be considered on the issue of abuse or neglect of any other child. *Family Court Act* § 1046. This would be important where the parents asserts that the injuries under consideration were accidential. The state could introduce proof that the parent previously abused or neglected another child and, thereby, impugn the credibility of the parent's story. Proof of abuse of one child could allow placement of all of the children in a household.

Proof that a child sustained injuries of such a nature as would ordinarily not be sustained except by acts of abuse or neglect can establish a presumption of abuse. *Family Court Act* § 1046. This presumption can serve as the basis for a finding of abuse or neglect by the court and, unless the parent comes forward with a credible explanation of the injuries, the court could find abuse or neglect.

Proof that a parent habitually uses drugs to the extent that would ordinarily produce a state of stupor, unconsciousness, intoxication, hallucination, disorientation or irrationality raises a presumption of neglect, unless the parent is voluntarily and regularly participating in a recognized rehabilitation program. *Family Court Act* § 1046.

Statements made by the child relating to abuse are admissible in court. However, the statement by itself will not be sufficient to establish abuse or neglect. The statement must be corroborated by other sources, such as medical reports or other witnesses. *Family Court Act* § 1046. This is particularly important where sexual abuse has been alleged.

Finally, the privileges attaching to confidentiality between husband and wife, physician and patient, and social worker and client are *not* a basis for excluding evidence in abuse or neglect proceedings. Spouses can be compelled to testify against each other; physicians against patients; and social workers against clients. The only privilege that survives in abuse or neglect cases is that between attorney and client, and, perhaps, clergy/penitent. *Family Court Act* § 1046.

Dispositions When Neglect or Abuse is Established

Generally, a court will follow one of four courses after abuse and/or neglect is found. It can suspend judgment, place the child out of the home, retain the child in the home and/or enter an order of supervision or protection. Each of these dispositions is described below. Please note, however, that a court may adjourn a case in contemplation of dismissal before the fact-finding hearing. This means that the case will be dismissed completely after a designated period (usually 6 months), if the parents no longer maltreat their child.

SUSPENDED JUDGMENT

A suspended judgment is a decision by the court to withhold a finding of abuse or neglect and, if the parent satisfies certain conditions, to later dismiss the case altogether. The court may suspend judgment upon one or more of the terms and conditions.

The terms imposed should relate to the acts of parents constituting the maltreatment. The judgment will be suspended for a designated period up to one year, at which time the parent and the Department of Social Services will report back to the court. If the parents have complied with the terms and conditions, the case should be dismissed. *Family Court Act* § 1053.

ORDER OF SUPERVISION

A court may order the child released to his or her parents and enter an order placing the parents under the supervision of a child protective agency, or social services official or duly authorized agency for up to eighteen months, and may extend the supervision for periods of one year at a time after the expiration of the eighteen months. The order must spell out the terms and conditions of the supervision and the duties and responsibilities of the supervising agency. *Family Court Act* § 1054.

PLACEMENT

The court may place the child in the custody of a relative or other suitable person, the Department of Social Services, or other designated agencies or institutions. While the child is in placement the family court may order DSS to make efforts to encourage visitation by the parent. The initial placement may be up to 18 months, and then the court may order successive extensions of up to one year each. Upon review of the placement, the court is empowered to order the Department of Social Services to free the child for adoption by moving to terminate the parents' rights over the child (see

"Foster Care and the Termination of Parental Rights"). Placement may not be continued beyond the child's 18th birthday without the child's consent, and in no event past the child's 21st birthday. *Family Court Act* § 1055.

ORDER OF PROTECTION

The court may enter an order of protection designed to prevent abuse or neglect in the future. The order will set forth conditions of behavior to be observed for a specified period of time. The order may require the parent or any other person before the court to:

(1) stay away from the home, the other spouse or the child;
(2) permit a parent to visit the child at stated periods of time;
(3) abstain from offensive conduct against the child, parent, or person in custody of the child;
(4) give proper attention to the care of the home;
(5) refrain from acts that tend to make the home not a proper place for the child.

The court may award custody to either parent or to an appropriate relative for the duration of the order. The court cannot, under an order of protection, place the child in an institution. *Family Court Act* § 1056.

Summary

The areas of child maltreatment and child maltreament proceedings are changing rapidly. The reader is encouraged strongly to keep informed of the changes which may take place after the publication of this manual.

Foster Care and the Termination of Parental Rights

Introduction

We stated earlier that minor-parents have the right to custody of their children over all others unless their parental right have been terminated. In this section we discuss the various grounds for termination of parental rights. The purpose of terminating a parent's rights is to free the child for adoption. At the outset we note that parents may find themselves subject to a proceeding to terminate their rights only if their children have been placed in foster care, either voluntarily or pursuant to a court order, and they seek the return of the child, or if the foster care agency seeks or is ordered by the court to free the child for adoption.

Abandonment

If a parent has "abandoned" his or her child for a period of 6 months prior to a court action to terminate parental rights, the child may be freed for adoption over the parent's objections. A child is abandoned if the parent

> evinces an intent to forgo his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency [with which the child has been placed], although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

Social Services Law § 384-b(5).

Young parents, who voluntarily place their children in foster care, or whose children are placed in foster care by court order, must maintain regular contact. If they are discouraged from visiting their children, or there are other circumstances which prevent visitation, notations should be made in a case file and other proof gathered. If the problem is persistent, complaint should be filed with the agency. In addition, an order directing visitation may be sought from the family court. Finally, parents dissatisfied with services received pursuant to the voluntary placement agreement may request a fair hearing to challenge the agency actions.

Mental Illness or Mental Retardation

A parent's rights may be terminated when he or she is presently, or for the foreseeable future will be unable by reason of mental illness or mental retardation to provide proper and adequate care for a child who has been in foster care placement for one year. This is somewhat controversial ground for termination of parental rights, but has been upheld in various court challenges.[57] Mental illness is defined as

> an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if [the] child were placed in or returned to the custody of the parents, the child would be in danger of becoming a neglected child as defined in the family court act.

Social Services Law § 384-b(6).

Neither one of these categories can serve as the basis for the termination of parental rights unless the child is in actual danger of becoming neglected as that term is defined in the Family Court Act (see "Child Maltreatment"). Thus, if a child is not living with a parent who suffers from a mental illness, or who is mentally retarded, but lives, for example with a grandmother, this provision would not apply.

Permanent Neglect

A parent's rights can also be terminated based on permanent neglect of the child. A permanently neglected child is a child who (1) is in the care of a foster care agency and (2) whose parent has failed for a period of more than one year from the time the child entered forster care to substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so despite the agency's diligent efforts to encourage and strengthen the parental relationship. *Family Court Act* § 614.

The agency bears the initial burden of demonstrating to the court that it made diligent efforts to re-unite the family before a parent may be found to have permanently neglected a child. Without this showing, the child may not be freed for adoption.

Young parents must be encouraged to maintain regular and frequent contact with their children in foster care, to make concrete plans for the future of the child, and to take concrete steps towards the return of the child from care. Failure to do so could result in an attempt to terminate the parent's rights.

Adoption

Introduction

A parent who determines that he or she cannot care for a child, and will not be able to do so, has the option of placing a child up for adoption. This can be accomplished in three ways: (i) by signing a written agreement called a "surrender" to an authorized child care agency, *Social Services Law* § 384, or (ii) by appearing before a family court judge or a surrogate court judge and agreeing to place a child up for adoption or (iii) by signing an agreement which consents to a designated person adopting a child. *Domestic Relations Law* § 115-b. These latter two ways are commonly referred to "private placement" adoptions.

Adoption is a very serious step and should only be considered when the parent is absolutely sure that he or she wants to permanently sever all ties with the child. A surrender must not be confused with a voluntary placement agreement in which the parent retains the right to revoke the placement and seek the return of the child. A surrender, as the term implies, means that the parent gives up all rights in the child. A surrender must be viewed as permanent although it can be revoked under extremely limited circumstances as discussed below. Before agreeing to place a child up for adoption, parents must first consider whether the provision of support services to the family, or the temporary placement of a child in foster care might eliminate the need for an adoption.

---

[57] In Matter of Nereidas., 57 N.Y.2d 636 (1982).

Procedure for Surrender to an Agency

The surrender instrument must be signed in the presence of at least two witnesses and a notary public. One of the witnesses must be an employee of the agency authorized to receive surrender. One of the witnesses must be a certified social worker or an attorney who is not an employee of the agency. The agency must file the surrender in court within 15 days of the surrender with certain required affidavits. One of the affidavits must indicate when supportive counseling was offered to the parent, whether the parent accepted counseling and, if so, when the counseling was provided and the nature of the counseling. The court, on notice to the parents, will schedule a proceeding where the surrender will be approved or disapproved. A parent who has received notice and wants to contest the surrender *must* appear at this proceeding (no other opportunity may be given).

The required contents of the surrender instrument are numerous and include:

1. that the parent has the right to speak to a attorney before signing the instrument, to have an attorney appointed if indigent, the right to receive supportive counseling;
2. that the parent is giving up all rights regarding the child;
3. that the child may be adopted without further notice to the parents;
4. that the parent cannot be forced to sign the surrender;
5. that if the surrender is signed before a judge, it becomes effective and irrevocable immediately;
6. that if the surrender is not signed before a judge, it becomes effective 45 days after the signing; and
7. that a surrender, not signed before a judge, revoked more than 45 days after the signing of the instrument, will not be effective if the child has been placed in an adoptive home.

Procedures for Surrender Before a Court

A surrender may be executed and acknowledged before a family or surrogate court judge. At the time of appearing before the judge, the parent will be advised by the judge of the rights to seek counsel, or have counsel appointed by the court. The judge will advise the parent of the consequences of the surrender, including the fact that the parent is giving up all rights over the child. A SURRENDER EXECUTED AND ACKNOWLEDGED BEFORE A FAMILY COURT OR SURROGATE JUDGE BECOMES EFFECTIVE IMMEDIATELY. THERE IS NO 45 DAY WAITING PERIOD.

Revocation

There are circumstances under which a surrender may be revoked, including the right to revoke a surrender signed with an authorized agency within 45 days of the signing. Apart from this right, however, the circumstances under when a parent may revoke a surrender are very limited and were recently changed by the legislature. BEFORE EXECUTING A SURRENDER, THE PARENT MUST BE ADVISED IN THE STRONGEST TERMS TO REVIEW THE MATTER WITH A KNOWLEDGABLE ATTORNEY.

Private Placement Adoptions

Private placement adoptions are adoptions in which parent enters into an agreement to permit a specified couple (or individual) to adopt his or her child. The child is not surrendered to an agency. Private placement adoption involves less judicial review and can be accomplished in two manners. First, a parent can execute a judicial consent which is irrevocable after it is executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced.

Domestic Relations Law § 115-b.

Second, a parent can sign a consent form to the adoption which becomes irrevocable unless revoked within 45 days after it is executed. *Domestic Relations Law* § 115-b. In order to revoke the consent, written notice must be sent to the Court where the adoption has been, or will be commenced.[58] Last, the parents' revocation of their consent will not result in an automatic return of the child, but the court could require a hearing to determine if a return to the parents would be in the child's best interests. This hearing would take place if the adoptive parents oppose the revocation.

Summary

A minor-mother should not surrender a child to an authorized agency for adoption or agree to a private placement adoption unless she is absolutely sure that she wishes to sever all contact with the child. Alternatives to a adoption should first be explored. Although there are circumstances where the surrender or agreement to a private adoption may be revoked, these are quite limited and difficult to prove. In situations where the Family Court has a proposed surrender agreement before it (i.e., in a situation where the child is in foster care), there is a strong argument that the assignment of counsel is required under Section 262 of the Family Court Act where the parent is indigent. Before a minor agrees to the adoption of her/his child, legal counsel should be obtained. Finally, this area of law is subject to swift change, and the reader should ascertain any post-publication changes.

Guardians

The need for appointment of a guardian most obviously arises where a young person's parents are deceased and, thus, there is no adult with legal responsibility and authority over the young person. However, guardians can also appointed when a young person's parents have abandoned him or her, or are otherwise not fulfilling their obligations as parents. In this section, we will discuss appointment of guardians for young people whose parents are deceased.

It is important to note that there are situations in which, although appointment of a guardian is believed to be required, it is not. For example, where a minor's parents are outside the state, an adult with whom the minor resides may enroll him or her in school without being appointed the young person's guardian (see "Minors and Schools - Attendance"). Similarly, a young person over age 16 may receive public assistance directly, without the need for appointment of a guardian.

If it becomes necessary to seek appointment of a guardian for a young person, a petition must be filed with either the Surrogate's Court or the Family Court. *Surrogate's Court Procedure Act* § 1701 et seq.; *Social Services Law* § 384-b(3) (for children in foster care). Cases involving mentally ill or retarded parents or neglect or abuse must be brought in Family Court.

The petition may be brought by any person on behalf of the young person, or by the young person if he or she is over the age of 14 years. *Surrogate's Court Procedure Act* § 1703. If a particular person is nominated in the petition, the court will determine whether that person has the necessary character, standing and ability to serve as guardian, as well as whether that person has any interests which conflict with the young person's interests. If the young person is over 14, his or her preference also will be taken into consideration.

Notification of the proceedings may be given to the young person's parents, if living; to grandparents, in some cases; to the person having care and custody of the young person; and to the young person, if he or she is over 14 years old. Notice may also be given to other relatives in some cases. *Surrogate's Court Procedure Act* § 1705. Also, notice is usually give to the Commissioner of Social Services if the minor has no parent.

Once a guardian is appointed, he or she will have responsibility over the property of the minor or, the person of the minor, or both. The appointment will expire when the young person reaches the age of majority, except the appointment of a guardian of the person of the minor expires on the marriage of the minor.

---

[58] Under limited circumstances, where the Court finds the adoptive parents unfit, the parents may have the right to revoke their consent even after the 45 day period.

Although the guardian will most likely be given the broad power to use the young person's property for the young person's support, education and other necessary expenses, the court may limit the guardian's authority in any of these areas. Finally, the appointment does not give the guardian greater rights of control over the minor's actions than a parent would have. Thus, a minor over 16, who is therefore not subject to PINS jurisdiction, could probably choose where to live alone without interference from the guardian or any court.

Summary

Legal guardians usually stand in the shoes of parents. For example, they may give consent for a minor ward in the same manner as parents, enroll a minor in school, sign employment certificates, consent to medical care for the minor and consent to a minor's marriage. As a practical matter, however, appointment of a legal guardian for older "emancipated" minors is often unnecessary.

Harassment Proceedings in Family and Criminal Court

Earlier we discussed the topic of child abuse, which concerns the maltreatment of children under 18 years of age by parents, or persons in the household on a continuous or regular basis. But what happens if the young person is over 18? Or if a young person is abused or harassed by a spouse or the father of her child? Also, what happens if a client is being abused or harassed by a boyfriend, girlfriend, or live-in lover?

Family Offense Proceedings

The young person may commence a family offense proceeding in Family Court, but only in the following circumstances.[59] The family court has authority to intervene on behalf of the young person if the offender:

a) is related to the young person by law ; or
b) is related to the young person by blood; or
c) is married or was married to the young person; or
d) has a child in common with the young person, regardless of whether they have been married or have lived together at any time.

Family Court Act § 812.

It is important to note that the Family Court does not have authority to act unless one of these prerequisites is met. Abuse by a boyfriend or girlfriend usually cannot be remedied in family court but could be addressed in criminal court, as discussed below.

To begin a family offense proceeding, the young person must go to the local Family Court and swear out a petition against the offender. The young person will then be referred to as the "petitioner." The alleged offending person will be referred to as the "respondent." Court personnel will provide a petition form and should inform the young person of the following:

a) that the criminal court also has jurisdiction over the matter;
b) that the family court proceeding is civil, and is for the purpose of attempting to stop violence, end the family disruption and obtain protection;
c) that a proceeding in criminal court is for the purpose of prosecution of the offender and can result in a criminal conviction;
d) that the action in the family court or criminal court begins when the young person swears out a complaint or petition;
e) that the young person's choice of whether to proceed in the family court or criminal court becomes final 72 hours after the decision unless later transferred by the court with the client and prosecuting attorney's permission; and

---

[59] A criminal complaint could also be filed (see below).

f) that an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for starting a proceeding.

Family Court Act § 812.

A young person may ask for a temporary order of protection when he or she starts the family offense proceeding, or at any stage of the proceedings. *Family Court Act* § 828. The temporary order of protection could take effect immediately and require, for example, that the offender:

a) stay away from the home, the young person or his/her child;
b) allow the young person to visit his or her child;
c) refrain from offensive conduct against the child, the young person, or against any other person to whom custody of the child has been awarded;
d) give proper attention to the care of the home; and/or
e) refrain from acts that tend to make the home not a proper place for the child.

Family Court Act §§ 828, 842.

If the offender violates an order of protection, the young person should call the police. The order of protection should be shown to the police when they arrive, since the existence of an order of protection will frequently persuade the police to take a "domestic dispute" more seriously. This is not to say that the police should not be called unless an order of protection has been issued. Of course, if a young person is in danger, or is being harassed, the police should be called (see also "Child Maltreatment"). An offender who disobeys an order of protection may be committed to jail for a period up to six months.

If a family offense proceeding is chosen, a summons will be issued for the offending party (respondent) to appear before the court on a specified date. The summons must be personally delivered ("served") on the offending party by a person over 18, *other than* the petitioner. The person who serves the summons must sign an "Affidavit of Service" before a notary public.

Once before the court, a fact-finding hearing, which is like a trial, will be conducted to see if the allegations in the petition are supported by a fair preponderance of the evidence. As a practical matter, however, these matters are often "settled" by the parties on the agreement of the offending party to cease doing the act complained of. Also, hearings are frequently rescheduled for later dates ("adjourned") due to busy court calendars, or to permit parties to locate witnesses, or for other reasons. It is important to note that, even if a case is being adjourned, it is permissible to request that a temporary order of protection be issued in the meantime.

If the matter is not settled, a hearing will be held. Both the petitioner and the respondent have the right to a court appointed attorney if they cannot afford to hire one. *Family Court Act* § 262. If the allegations in the family offense petition are supported by the evidence, the judge may:

a) suspend judgment for a period not in excess of six months and, if the offender's behavior is satisfactory during that time, dismiss the action; or
b) place the offender on probation and require the offender to participate in an educational program; and/or
c) issue an order of protection as described above.

Family Court Act § 841.

A family offense proceeding will not result in a criminal conviction, imprisonment, or a fine. The offender will not have a criminal record as a result. Imprisonment would result only if the offender violates an order of protection or other order of the court. The young person is not required to use the family court and may, instead, file a criminal charge (described below).

Criminal Procedure

If the young person chooses not to use the family offense proceedings, or if the family offense proceeding cannot be used, the criminal court process may be used. Possible criminal charges include disorderly conduct, harassment, menacing, assault, or attempted assault, just to give a few examples. As a practical matter, police and court personnel often discourage people from pressing these type of charges, viewing them as "domestic" in nature, and inappropriate for the criminal court process. However, the young person may insist that criminal charges be pressed. It is not up to the police or court personnel to decide the validity of criminal charges -- that is the function of a judge or jury. Indeed, court personnel are prohibited by statute from discouraging any person from pressing a criminal complaint in this area. *Family Court Act* § 812. However, as a practical matter, the person who seeks to press a criminal complaint may have to be quite persistent.

When the complaint is filed, the young person should be given information similar to that set forth under the family offense proceeding.

Once the criminal complaint is filed, the young person may ask to appear before a judge and request a temporary order of protection. When the offender is a family member, as described above, the court may require the offender:

a) to stay away from the home, school, business or place of employment of the family or household member;
b) to permit a parent to visit a child at stated periods;
c) to refrain from offensive conduct against the child or against the family or household member or against any person to whom custody of the child is awarded; or
d) to refrain from acts that tend to make the home not a proper place for the family or household member.

Criminal Procedure Law § 530.12.

Where the offending party is not a family member, the criminal court is still authorized to issue orders of protection which may require the offender to:

a) stay away from the home, school, business or place of employment of the victim or victims of such offense; or
b) refrain from harassing, intimidating, threatening or otherwise interfering with the victim or victims of the offense and such members of the family or household of such victims as shall be specifically named by the court in such order.

Criminal Procedure Law § 530.13.

As a practical matter, criminal proceedings of this nature are often "settled" without going to a trial. This could include, for example, the offending party agreeing to cease harassing the complainant. If the case goes to trial, the young person would be required to show, beyond a reasonable doubt, that the offender in fact engaged in the complained of behavior. Should the defendant be found guilty, the penalties would depend on what is prescribed by the Penal Law.

Where there is a need for immediate protection, this must be brought to the attention of the police and/or court personnel, whether the proceeding is brought in criminal court or family court. The police may agree to pay a "visit" to the offender, or the young person may be allowed by court personnel to appear before a judge and obtain an order of protection. While the facts should not be exaggerated, they should not be minimized or understated. Only if the authorities view the matter as serious will action occur. If an order of protection is violated, the young person should call the police and, when they respond, show them the order. Police are much more likely to intervene if the offender is violating an order of protection. Again, the police should be called when necessary, even if no order of protection exists, and they should be urged to take appropriate protective actions.

Summary

The need for protection within the family does not end when a person turns 18, but many people are unaware of the family offense proceeding as a source of protection. Also, we have found that young people who are being harassed by "non-family" members frequently are unaware that they may seek protection from the criminal court. Both of these proceedings can provide a needed avenue of relief, and young people need to be made aware of their existence.

Involuntary Commitment to a Mental Health Facility

Parents who cannot use the family court to enforce their wishes *vis-a-vis* their children (for example, if the young person is 16 and therefore not subject to PINS jurisdiction), sometimes seek to enforce their will by attempting to commit, or by threatening to commit, their children to a psychiatric facility. The parents might sincerely believe that the young person needs psychiatric evaluation, or they may be trying to punish their noncompliant children. Involuntary commitment to a mental facility is a drastic step, and cannot occur simply because the parents believe that a son or daughter requires help. Below we describe briefly the process for involuntary commitment.

Mental Health Warrant

One avenue that the parent might take is to seek a warrant to have the young person brought before a court to have a judge determine if the young person is in need of a psychiatric evaluation. Section 9.43 of the Mental Hygiene Law permits judges to issue such warrants on the verified statement of a person (for example, the parent) that another person (for example, the young person) is mentally ill and is conducting him or herself in a manner which, in a person who is not mentally ill, would be deemed disorderly conduct or which is likely to result in serious harm to self or others. *Mental Hygiene Law* § 9.43.

The allegations of parents are presented to a judge, who may issue a warrant which permits the police to take the young person into custody for the sole purpose of delivering the young person to the court so that the judge may determine if the young person is in need of psychiatric evaluation. The warrant is valid only for thirty days and during the hours when court is in session. So, for example, the young person could not be taken into custody on a weekend, or in the evening, unless the court is then in session.

When the young person appears in court, the judge must make a determination, based on the evidence presented, whether the young person has or may have a mental illness which is likely to result in serious harm to self or others. If the judge makes this finding, the young person can be delivered to a facility for psychiatric evaluation (see "Involuntary Commitment" below).

At the hearing, the young person should present evidence that he or she is not in need of an evaluation, and is not a threat to self or others (if, indeed, this is the case). Evidence could include notarized statements from counselors, therapists, or physicians. Such statements from mental health professionals familiar with the client frequently are accorded great weight. Any evaluation submitted to the court should have occurred within the previous ten days (but an older evaluation could be used if necessary). The young person will also be questioned by the judge, who will probably be concerned with the young person's living situation, outward demeanor, and past psychiatric episodes, if any. The purpose of this proceeding is not to commit a young person to a facility, but rather to require a psychiatric evaluation to see if commitment would be appropriate.

Involuntary Commitment

In New York, a young person may not be involuntarily committed to a psychiatric facility at the request of a parent alone. Rather, involuntary commitment may occur only after two physicians (one of whom must be on the staff of the psychiatric facility) certify that the young person "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he [or she] is unable to understand the need for such care and treatment." *Mental Hygiene Law* §§ 9.01, 9.27. Prior to making this determination, the physicians must consider less restrictive alternatives to involuntary commitment.

A young person involuntarily committed to a psychiatric facility has the right to demand a hearing before a judge to determine whether the hospitalization is appropriate. The hearing must be scheduled for a time not later than five days after the request is received by the court. The young person has the right to be represented by counsel, and, if he or she cannot afford counsel, to have an attorney appoint from the Mental Health Information Service. The judge must release the minor if he or she is not in need of involuntary hospitalization.[60]

Summary

Young people should be advised that, even when they are 16 or over and beyond the reach of the family court, a parent may attempt to use involuntary commitment to a psychiatric facility as a means of reasserting control over a young person, although in our experience, this does not happen often. This approach, however, vests control in psychiatrists, not the parents. Last, unless the need for a commitment is quite apparent, young people will probably not be involuntarily placed in a psychiatric facility. The accuracy of the decision in such cases can be greatly enhanced by the involvement of mental health service providers who know the young person well.

---

[60] Parents could also attempt to have a "committee" or a "conservator" appointed for the young person. These proceedings are primarily oriented to persons who have become unable to care for themselves and their property by reason of age, illness, etc., and are generally used in cases involving relatively large estates. Because these proceedings are rarely used in cases of young people, we will not describe the procedures. Interested readers may wish to obtain more information on these proceedings.

CHAPTER III

MINORS AND PUBLIC ASSISTANCE

Introduction

In this section, we discuss minors and public assistance. After setting forth some general comments, a review of the types of programs we have included and a brief descriptions of fair hearings, we cover the following topics:

- Minors with no children living apart from their families,
- Minors with no children living with relatives,
- Pregnant minors living with their parents,
- Pregnant minors living alone,
- Pregnant minors and Medicaid,
- Minor parents living apart from their parents,
- Minor parents living with their parents,
- Recent changes in the law,
- Minor parents living with adult relatives,
- Social Security,
- Supplemental Security Income.

Finally, we set forth questions frequently asked about welfare, as well as their answers.

General Comments

Advocating on behalf of young people in need of public assistance is often quite trying and difficult. Minors may find that employees of the various Departments of Social Services ("DSS") deny them application forms or discourage them from applying. As a result, minors often are not allowed even to submit an application for public assistance, much less actually receive a grant. Minors may be told to "go home to your parents who are legally responsible for you until you're 21." This practice of not allowing minors to apply for public assistance is illegal.[1] While it is true that parents are legally responsible for their children until age 21, this does not mean that a minor cannot receive public assistance.

A young woman 16 or over who is a mother may unquestionably receive benefits under the Aid for Families With Dependent Children program for herself and her child, whether or not she lives apart from her parents, if she is financially eligible. (18 N.Y.C.R.R. § 369(b), 81 ADM-55, *Source Book*, Section VIII-P.) In fact, a minor 16 or over who lives with younger brothers and sisters may be paid benefits for the entire household. Minors 16 and over with no children and who live by themselves also may receive public assistance in the form of Home Relief. Indeed, the law is clear that minors 16 years of age or older, who have completed their compulsory education, are living separate and apart from their families, and are not in receipt of or in need of foster care, are considered adults for purposes of public assistance.

Minors under 16 years of age, however, may not receive public assistance in their own right. The law presumes that these minors are too young to be living independently and, therefore, require adult supervision. Any public assistance will be paid to an adult with whom the minor resides. *Source Book*, Section VIII-P.

---

[1] Tucker v. Toia, 400 N.Y.S.2d 728 (Ct App 1977).

In view of the clear legal right of needy minors to receive public assistance, what should the service provider do when advised by a DSS worker that minors cannot receive public assistance? The provider should educate the worker on the correct state of the law. The worker should be informed that the application must be processed and that needy minors are legally entitled to apply for and, when eligible, to receive public assistance. This should be done in a courteous but firm manner. If the worker refuses to process the application, request to speak with his or her supervisor (see "Advocacy Steps"). A minor in need of public assistance should be sent to the Center with a letter outlining their legal rights to public assistance.

Convincing a DSS worker to process the application is only half the battle. The other half is getting a meritorius case accepted. We offer a few suggestions. First, the minor should be counselled to be courteous and polite to DSS workers, as should the service providers. Clients or providers who have an "attitude" rarely help their cause, and more often spell its doom. Second, the client should be counselled to cooperate with DSS requests to the maximum extent possible. This is often difficult, especially when DSS makes outrageous requests for documents in support of the application for assistance. The failure to supply documents, however, will usually result in the case being rejected, even if the document was not needed.

While the minor may request a fair hearing to challenge the rejection, even if successful, it may take months before he or she will actually receive benefits.[2] If a document cannot be obtained, call the worker and arrange for an acceptable substitute. Also, bear in mind that DSS has an obligation to assist applicants in obtaining necessary documents. Be sure to document in writing your attempts to secure requested information and request, in writing, assistance from DSS when a document cannot be obtained.

A copy should be made of any documents submitted to DSS, and all letters on behalf of minors should be notarized where possible. When in doubt whether a document should be submitted, simply submit it.

Finally, make sure that the minor keeps all appointments with DSS. If an appointment cannot be made, call the worker and arrange for another. Failure to do so could result in the application being rejected.

Remember, in advocating for a minor in need of public assistance, your goal is to assure that eligible minors are accepted, and not to become embroiled in needless disputes with DSS. In our experience, a conciliatory approach, supported by firm statements of the correct rules and of a willingness to pursue the matter with supervisors if necessary, is the most successful approach to helping minors who are in acute need of assistance.

Types of Programs

In this section, we discuss five different programs: (1) Aid to Families With Dependent Children (ADC), which provides assistance to needy families with children under 18 (or, in certain cases, under 19); (2) Home Relief (HR), which provides assistance to needy, able-bodied, childless individuals or couples; (3) Food Stamps, which provides assistance to reduce hunger and malnutrition by supplementing the food purchasing power of eligible low income individuals or families; (4) Medicaid, which pays for the necessary medical services for eligible low-income individuals and families; and (5) Social Security Benefits.

The purpose of this section is not to provide an exhaustive discourse on public assistance programs -- that is far beyond the range of this manual. Rather, we discuss public assistance programs in view of their special application to minors. We recommend the following resources to those interested in more information:

- The Public Assistance Source Book, published by the New York State Department of Social Services;

---

[2] The advocates should know that under certain emergency circumstances expedited fair hearings can be requested.

- New York State Department of Social Services Administrative Directives and Information Bulletins;
- Food Stamps Manual, published by the New York State Department of Social Services;
- Food Stamps Source Book, published by the New York State Department of Social Services;
- Manual for Welfare Advocates, published by Community Action for Legal Services;
- An Advocates Guide to Welfare Hearings, published by Community Action for Legal Services;
- Welfare for College Students, published by Community Action for Legal Services;
- Advocates Guide to the Food Stamp Program, published by Community Action for Legal Services; and
- Reference Guide for Medical Assistance (Medicaid), published by the New York State Department of Social Services.
- Cornell Legal Aid Welfare Manual, published by the Cornell Legal Aid Clinic of Cornell Law School.

Most references in this section are to "The Source Book," which is an invaluable reference tool in welfare advocacy. With the exception of our discussion of Social Security benefits, we have not discussed programs separately, but rather have set forth the various living situations that young people might present, and the forms of public assistance for which they might be eligible in each situation.

Fair Hearings

If informal advocacy does not resolve a client's situation, an administrative hearing ("fair hearing") may be requested. At the fair hearing, a representative of DSS presents the basis for the agency action, and the applicant or recipient presents their reasons why the DSS action was wrong. A hearing officer presides at the hearing and makes a report to the state commissioner (of Social Services), who then makes the final agency decision. Applicants and recipients have the right to review their files prior to the hearing, and if their file is not brought to the hearing, the agency action must be rescinded. In addition to a client's right to review a file, the client has a right to receive a copy of all documents that the DSS intends to submit at the hearing. If possible, an advocate should accompany the client to the hearing. For more information about fair hearings, (see "The People's Guide to Fair Hearings," published by the Legal Aid Society, Civil Division in New York City).

Minors With No Children Living Apart from their Families

Minors, 16 and over with no children, who live apart from their families, who have completed compulsory education, and who are not in receipt of or in need of foster care may receive public assistance in the form of Home Relief (HR). *Source Book*, Section IX-B-1; 18 N.Y.C.R.R. §§ 349.5, 370.2, 369.3(b)(4). HR provides assistance to needy, able-bodied, childless individuals. The minors may required to register with the employment agency of the Department of Labor, unless:

1. The person, 16-21, is in school full-time, including vocational or technical school, college or university, or a course designed to fit its students for gainful employment; or
2. The minor is in an approved full-time training or rehabilitation program; or
3. The minor is ill or incapacitated.

Source Book, Section XI-C-1.1 - 1.3.

The HR allowance consist of a basic cash grant, a shelter allowance, a fuel allowance if heat is not included in the rent, plus a home energy allowance. The shelter allowance pays for an apartment or a room for the minor. The maximum that DSS will pay for shelter is established at a county level. The minor who receives HR will receive Medicaid and probably Food Stamps as well.[3]

---

[3] If the minor is a student, special food stamp rules may apply. See 18 N.Y.C.R.R. §§ 387.1 (ee), 387.17(l)

Minors who apply for public assistance must understand that because their parents are legally responsible to support them up to age 21, they may be required to cooperate with DSS in a family court action to seek support from their parents. Minors are often denied assistance on the basis that their parents are legally responsible for their care when, in fact, DSS should accept the application and begin an inquiry into the appropriateness of the parent's home. DSS may not require that the minor produce an order of support as a condition to assistance.[4] Minors who apply for HR may be denied assistance if their parents offer a home to the minor, and there are no good reasons for the minor not to return home.[5] Minors who apply for ADC cannot be denied assistance based on their refusal to return home.

Minors With No Children Who Lives With Relatives

A minor who does not live with his natural parents, but who lives with a relative may be eligible for Aid to Families with Dependent Children (ADC) if the minor lives with one of the following persons:

1. The child's brother, sister, grandfather, great-grandfather, great-great-grandfather, grandmother, great- grandmother, great-great-grandmother, uncle, great-uncle, great-great-uncle, aunt, great-aunt, great-great-aunt, of the whole or half blood;
2. The child's first cousin, nephew and niece, of whole or half blood;
3. The child's stepfather, stepmother, stepbrother, or stepsister, but no other step-relatives;
4. In the case of a child who has been surrendered to an authorized agency or who has been adopted:
    a. any of the pool of step-relatives listed above,
    b. the child's adoptive parents, and
    (1) The other children of the adoptive parent and children of such children,
    (2) the parents, grandparents and great-grandparents of the adoptive parents,
    (3) the brothers and sisters of the adoptive parents and children of such brothers and sisters, and
    (4) the aunts, uncles, great-aunts, and great-uncles of adoptive parents;
5. The spouse of any person described above, even though the marriage may have been terminated by death, divorce, or annulment;
6. In the case of a child born out-of-wedlock, any relative in the maternal line included in the preceding paragraphs, and, if paternity has been adjudicated or acknowledged in writing, any relative in the maternal or paternal lines included in the preceding paragraphs.

Source Book, Section VIII-A.

Even if the household in which the minor lives has too much income to receive public assistance on its own, the head of the household may still receive ADC on behalf of the minor. *Source Book*, Section VIII-E. This is obviously of great value where a relative is willing to take a minor in, but needs financial assistance to do so. The minor would also be eligible for Medicaid and may qualify for Food Stamps. AFDC could be received on behalf of the minor up to his 18th birthday, or up to age 19 if he is a full-time student in secondary school, or in the equivalent level of vocational or technical training and is expected to complete the program before reaching age 19. *Source Book*, Section VIII-F-1. After this time, the minor could receive Home Relief and should be encouraged to make an application. Note that recent amendments to the ADC law may limit the right of a person to receive ADC on behalf of a minor when the household income is too great, if certain relatives (i.e., blood-related siblings under age 18, parents or grandparents) also live in the household.

---

[4] Edwards v. Travis, 57 A.D.2d 687, 393 N.Y.S.2d 830 (3rd Dept. 1977); Reves v. Blum, 78 A.D.2d 1001, 433 N.Y.S.2d 912 (4th Dept. 1980).

[5] Nafziger v. Blum, 551 F. Supp. 705 (NDNY, 1982), aff'd 695 F.2d 668 (2d Cir. 1982).

Pregnant Minor Living With Parents

If a pregnant minor lives with her parents and her needs are met by her parents (or her parents have sufficient income to do so), the pregnant minor may not receive ADC or HR for herself or for her unborn child. However, she may receive Medicaid for the unborn child. (See "Pregnant Minors and Medicaid.")

Pregnant Minors Living Alone

A pregnant minor over 16 years of age who lives alone may receive Home Relief up to the sixth month of her verified pregnancy, presuming other eligibility requirements are met. In addition, after the fourth month of her pregnancy, she should receive a special pregnancy allowance. *Source Book*, Section VIII-W-1.1. Finally, beginning with the sixth month of her pregnancy, her case should be changed from Home Relief to ADC. *Source Book*, Section VIII-L-6.1.[6] The minor should receive Food Stamps and Medicaid throughout.

Pregnant Minors and Medicaid

Pregnant minors with incomes up to 185% of federal poverty guidelines are eligible for Medicaid reimbursed prenatal services without regard to resources. *Social Services Law* § 366.4 (m), (n), (o). Indeed, pregnant minors are presumptively eligible for Medicaid immediately upon verification of a pregnancy for up to 45 days from the date that a qualified provider determines that the minor falls within income eligibility guidelines. Once found to be presumptively eligible, the pregnant minor must follow through and complete the Medicaid application process.

If the pregnant young person is under the age of 21, and lives at home, the income of her parents will be considered in determining if she meets the income guidelines. However, pursuant to a court injunction, the pregnant minor may apply on behalf of her unborn child and should be encouraged to do so.

A pregnant minor determined eligible for Medicaid for any month during her pregnancy, will continue to receive medicaid for herself and her child for 60 days after the birth, regardless of family circumstances (e.g. income). Moreover, the infant will continue to receive full Medicaid up to his or her first birthday if the household income equals or is less than 185% of the federal poverty guidelines.

Minor Parents Living Apart from their Parents

A minor parent, 16 and over, who has established an independent household with her child, may receive ADC, Food Stamps and Medicaid. The grant may be paid to her directly. *Source Book*, Section VIII-P-1 & 2. A minor under 16 and living alone will not be paid benefits directly and will be presumed to be in need of adult supervision.

Advocates should be aware that the Family Support Act, P.L. § 100-485, could affect the provision of ADC to minor parents. One provision would allow states to impose a requirement that pregnant minors, or minor custodial parents who have never been married, live in a setting where they are supervised by an adult in order to receive ADC. The adult, moreover, is to be designated the payee where possible. There are circumstances where the state would not be permitted to impose this requirement including (1) the parents of the minor are dead or missing, (2) the home of the parents would jeopardize the physical or emotional health of the minor, and (3) the minor was living independently for at least a year prior to the birth of the child. As of the publication of this manual, New York did not have such a requirement.

Minor Parent Living With Immediate Family

Changes in the Federal Aid to Families With Dependent Children program, as implemented by New York State in Administrative Directive 85 ADM-33, require that, when a minor *under 18* applies for assistance on behalf of her child, the household, for purposes of determining eligibility, must include the income of any of the following who live in the household with the child*: (i) the minor-parent; (ii) the minor-parent's blood related brothers and sisters who are under 18*; and *(iii) the parents of the minor-parent*. New York State has adopted these same rules for the Home Relief program.

---

[6] This is important because a minor applying for ADC cannot be denied assistance because she refuses to return home. Again, the offer of a home could result in the illegal denial of an application.

These rules represent a significant change in policy and are highly controversial. They are being challenged on appeal, in *Lovelace v. Gross*. In the meantime, service providers should be aware of the changes, which have been implemented throughout the State, and should attempt to ensure that the new rules are being applied correctly.

For example, the rules clearly apply only to blood related brothers and sisters under 18 and to minor parents under 18. Prior policies would therefore continue to apply to cases in which the child's parent is 18 or older (i.e., the income of grandparents living in the same household would not be counted in evaluating the child's public assistance application). A young person between the ages of 18 and 21 could apply for and receive ADC on behalf of her child without regards to the income of the young person's parents.

In addition, it should be noted that there are some exceptions to the application of these new rules. The following individuals are not included in the household even if they fit the descriptions stated above: (i) SSI recipients; (ii) legal aliens sponsored by an organization, agency or individual; (iii) illegal aliens; (iv) individuals who have been "sanctioned" because of violation of public assistance program rules; and (v) persons receiving lump sum payments under certain circumstances.

Finally, providers should keep informed on developments in this area by contacting advocacy organizations, and should report to advocacy organizations any cases in which emergency situations result from application of these rules to children.

Minor Parent Living With Relatives

A minor parent living with relatives may receive ADC for herself and her child in the same manner as a minor living with an adult relative (see above).

Social Security Benefits

Social Security benefits are best known as retirement and disability benefits paid to people who have contributed to the Social Security system through payroll deductions. The program also includes benefits for children of workers who receive retirement or disability benefits or for children of deceased workers if the requirements described below are met. These benefits are referred to as Children's Benefits (see 42 U.S.C. § 402(d); 20 C.F.R. §§ 404.350-369).*

Who is Eligible

To be eligible for Children's Benefits, a young person must meet the following requirements:

- be the natural or adopted child or stepchild of a "wage earner" who has contributed to the system for at least ten calendar quarters (grandchildren may also be eligible under limited circumstances, see 20 C.F.R. § 404.358);
- be unmarried, unless his or her spouse receives Children's Benefits on another wage earner's account (20 C.F.R. § 404.352(b)(2));
- be dependent on the wage earner. The rules for determining dependency are complex and differ for each type of child (e.g., natural, adopted, step), but all relate to the extent of support of the child provided by the wage earner and take into account whether the child lived with the wage earner (20 C.F.R. §§ 404.360-366), and
- the wage earner must be deceased or in receipt of Social Security retirement or disability benefits.

---

* U.S.C. is an abbreviation for "United States Code." C.F.R. is an abbreviation for "Code of Federal Regulations."

If these requirements are met, the young person may receive benefits until age 18, or, if a full-time elementary or secondary school student, until he or she reaches age 19 (including summers as long as the student intends to continue school within four months). 20 C.F.R. § 404.368; 20 C.F.R. § 404.367. If the young person is disabled before the 22nd birthday, benefits continue until the disability ceases.

How to Apply

The Social Security Administration has local offices throughout New York State. A young person may apply by going to any local office. A representative will help the young person fill out the application. It will be helpful if the young person can supply the representative with social security numbers for him or herself and his or her parents.

How are Benefits Determined

The amount of benefits is computed using a formula which is based on the wage earner's Primary Insurance Amount, which in turn is based on the amount contributed to the system by the wage earner. However, this does not mean that the social security program is an insurance program. On the contrary, Congress can alter the level of benefits or eligibility requirements.

If both of a young person's parents were wage earners who contributed to the Social Security system, the young person would receive benefits only on one account. The Social Security Administration would compute the benefits under each parent's wage record, taking into account their Primary Insurance Amount and the other people eligible for benefits on each account. The young person would receive whichever benefit is higher, but would not be entitled to receive benefits on both accounts. 20 C.F.R. § 404.353(b).

Representative Payees

Children's Benefits are generally paid to a parent or other adult on behalf of young people under age 18 (referred to as "representative payees"). 20 C.F.R. § 404.2010(b). In some cases, benefits will be paid directly to older minors if they show the ability to manage the benefits. Examples include minors who receive benefits on their own earnings records, minors in the military, minors living alone who are self-supporting and minors who are parents. 20 C.F.R. § 404.2010(b). A representative payee might also be appointed for a person over 18 who is incapable of handling the benefits him/herself.

The representative payee receives the young person's benefits and is required to use them only for the current maintenance of the young person, which includes food, clothing, shelter, medical care and personal comfort items. 20 C.F.R. § 404.2040. If the young person's current maintenance needs are met, the representative may use part of the payments for the support of the young person's legally dependent spouse, child or parent. 20 C.F.R. § 404.2040(c). The representative payee is required to place any unspent benefits in a bank account for the young person's benefit. If John Doe is the representative payee for Mary Moe, the title of the account should be "Mary Moe by John Doe, representative payee." 20 C.F.R. § 404.2045.

On occasion, young people report that they believe their representative payees are using the benefits for themselves or are not giving the young person enough of the benefits for spending money. Many times, such allegations reflect the young person's lack of understanding that he/she may be required to contribute to household expenses such as rent or food, or the payee's (often a parent's) disapproval of a young person's desire to use the benefits for non-essential items while the payee may be budgeting the benefits to cover the young person's necessary expenses or saving any excess for future needs.

However, there are cases in which the payee is indeed misusing the funds. In such cases, a report should be made to the Social Security Administration, which will investigate the matter and might appoint a new representative payee or, if the young person meets the qualifications set forth above, might authorize payments directly to the young person. See 20 C.F.R. § 404.2050. During the investigation, and prior to appointment of a new payee, one or more benefit checks may be temporarily held by the Social Security Administration to avoid any misuse.

Supplemental Security Income (SSI)

The Supplemental Security Income (SSI) program provides benefits to people who (1) are blind or disabled *and* (2) have income and assets below certain limits. The definition of disability is whether a physical or mental limitation (other than blindness) is expected to last more than 12 months or to result in death, and prevents the person from engaging in substantial gainful activity. Federal law contains a list of childhood impairments with requisite severity levels which would qualify a child for benefits. Moreover, other impairments (i.e., learning or behavioral problems) may also be of sufficient severity so as to qualify a child for SSI benefits. The income limitation is quite low, and subject to change; current information can be obtained from a local Social Security Administration office. In New York State, all SSI recipients are automatically eligible for Medicaid benefits.

Miscellaneous Questions

Can a minor be forced to sue to enforce support obligations before receiving assistance?

The simple answer is no, but the young person must cooperate in the event that DSS decides to go to family court for an order of support. *Source Book*, Section VIII-T-1-6. This can arise in two situations. DSS may sue the parents of a minor receiving public assistance for support because the parents remain financially liable for their children under 21 years of age. DSS may also sue the father of the minor's child because he is legally liable to provide support for the child. The minor is *not* required to bring these actions, nor can assistance be denied or delayed pending a court action for support. The minor, however, must cooperate with DSS to the extent he or she is able, based on information in his or her possession. This cooperation could include assisting DSS in:

(1) locating any absent parent,
(2) obtaining any support which may be due to them and/or any child for whom ADC is being applied for or received,
(3) establishing paternity of a child born out-of-wedlock for whom ADC is applied for or received,
(4) appearing at the offices of the state or local agency or the child support agency as necessary to provide verbal or written information or documentary evidence, known to or possessed by the recipient, which is relevant to achieving the above objectives,
(5) appearing as a witness in court or at other hearings stated above, or
(6) providing information, or attesting to the lack of information, under penalty of perjury,

Source Book, Section VIII-T-1.

If the minor does not know or have information about the identity and/or location of the parent or father, assistance cannot be denied unless DSS has reasonable grounds showing that the minor has withheld information or lied. Reasonable grounds *do not* include failure to have information, even if it is reasonable to expect the minor to have such information, or a suspicion that the minor is lying or withholding information, or dissatisfaction with the minor's demeanor. Thus, a minor cannot be denied assistance because she does not know, for example, the father's social security number or current place of employment. DSS must have credible independent evidence that the minor is lying, or show that the minor has given inconsistent information for which there is not reasonable explanation. *Source Book*, Section VIII-T-1.2.

In addition, under certain narrow circumstances, the minor-parent may refuse to cooperate with DSS in establishing support. This could occur when:

1) cooperation is expected to result in serious physical or emotional harm to her child; or

2) cooperation is expected to result in physical or emotional harm to the minor which is so serious that it will reduce the minor's ability to adequately care for her child; or
3) the child was conceived as a result of incest or forcible rape; or
4) legal adoption of the child is pending before the Court; or
5) the parent is receiving pre-adoption services.

Source Book, Section VIII-T-1.2.

The minor bears the burden of proving these circumstances and must produce adequate proof to substantiate her concerns (e.g., police reports, order of protection, etc.).

If support is obtained from the father of the minor-parent's child, the minor parent is entitled to receive $50 per month of that support over and above the PA grant she is receiving. *Source Book*, Section XVI-J-2.1.

Must a minor who receives public assistance participate in a work or educational program?

As the result of recent welfare reform, the situations where minors may be requested to participate in work or educational programs have changed dramatically. Unfortunately, at this writing, all of the rules and regulations are not know and cannot be set forth. Thus, the reader will have to seek guidance from other sources. What is known is that young people under the age of 20, without a high school diploma, may be required to participate in an educational program without regard to the age of her child if adequate child care is available. Young people over the age of 20 are exempt from work and education requirements if they have children less than 3 years old. This exemption ends when their child reaches 3 years old if adequate child care is available. Adequate child care is considered available if the Department of Social Services has offered certified child agencies to care for the child or the young person is able to obtain child care on her own.

Is a student's income counted in calculating a family's need for ADC?

All of the earned income of a child or minor receiving ADC who is a full-time or part-time student and not employed full-time is exempt and disregarded as income or resources in determining eligibility or degree of need for a family's public assistance application. School attendance means attending school, college or university, a course of vocational or technical training designed to fit a person for gainful employment, participation in the Job Corps Program under the Job Training Partnership Act. Part-time attendance means at least one-half of a full-time curriculum as determined by the educational authority. *Source Book*, XVI-D.

Are college grants, loans, and scholarships counted as income for purposes of public assistance?

No. Educational grants, loans, and scholarships to undergraduate students cannot be counted as income or resource for purposes of need for public assistance. *Source Book*, Section XVI-N-1. These grants, loans, scholarships and other income include, but are not limited to:

1. Pell Grants
2. National Direct Student Loans
3. Supplemental Educational Opportunity Grants
4. College Work-Study Programs
5. Tuition Assistance Program Awards (TAP)
6. Educational Opportunity Program (EOP)
7. SEEK
8. College Discovery Program
9. Higher Education Opportunity Program (HEOP)
10. Regents College Scholarship
11. New York Higher Educational Services Corporation Loans (HESC)

Can college students receive public assistance?

College students may receive Home Relief provided they meet the eligibility criteria (e.g., lack of parental support). Persons between 16 and 21 are exempt from work registration if they are attending a two year college program full-time or meet work requirements. *Source Book*, Section XI-C-1.1. However, DSS could sue the parents of a college student receiving HR for support.

Can college students receive Food Stamps?

Any person between 18 and 60, who is physically and mentally fit and enrolled at least half-time in college may not receive food stamps unless one of the following applies:

a. The student is employed for a minimum of 20 hours per week and is paid for such employment. If self-employed, is employed for a minimum of 20 hours per week and receives weekly earnings at least equal to the federal minimum wage multiplied by 20 hours; or
b. The student participates in a federally financed work study program (funded in full or in part under Title IV-C of the Higher Education Act of 1985) during the regular school year; or
c. The student provides more than half the physical care for one or more dependent household members under the age of six;
d. The student provides more than half the physical care of a dependent household member who has reached the age of six but is under age 12 where adequate child care is not available;
e. The student receives ADC benefits; or
f. The student is assigned to or placed in an institution of higher learning through a program under the Jobs Training Partnership Act.

How long does DSS have to act on an application for assistance?

DSS must make a written decision not later than 30 days from the date of the application except where the applicant requests additional time or where difficulty in verification leads to unusual delays, or for other reasons beyond the social services official's control. *Source Book*, Section IV-F-1.

Must DSS accept for processing an application for public assistance by anyone who wants to apply?

Yes. DSS must accept the application for processing even if it believes that the applicant will not qualify. *Source Book*, Section III-B. This is very important because it is very difficult to appeal the action of DSS unless there is a written decision on the application. Also, DSS workers or supervisors are more careful when they are required to state the reason for a rejection in writing. For example, we have been told over the telephone by DSS workers that minors cannot receive public assistance and, therefore, there is no need to make the application. But when we have insisted that the decision be in writing, we have rarely seen this as a basis for rejection. As a general rule, government workers are much more careful when asked to put things in writing.

What happens if an application is rejected?

An applicant can request a fair hearing to challenge a rejection within 60 days of the notice date on the denial letter (90 days for food stamps). The fair hearing process, however, can be lengthy and it can take months to receive a final decision.[7] Obviously, a minor rarely can wait for such a long time. We recommend that informal advocacy be attempted in the first instance. If no resolution is obtained, the minor should reapply for assistance, hopefully curing the reason for the rejection (e.g., failure to submit documents or keep an appointment). A fair hearing on an initial denial should be requested after re-application, but within 60 days after receipt of the initial decision. In our experience, DSS will frequently refuse to reconsider an application if it knows that a fair hearing has been requested. Thus, by reapplying before requesting the fair hearing, the minor may be accepted on the second application. The fair hearing can be used to recover benefits that should have been paid after the first rejection and up to the time of acceptance.

---

[7] The advocate should note, however, that under limited circumstances, an expedited fair hearing can be held.

What happens if DSS notifies a recipient of its intent to discontinue or reduce benefits?

DSS cannot reduce or discontinue benefits without giving 10 days prior notice setting forth the reasons why they intend to do so, and the date the action will take place. *Source Book*, Section VI-B-1. If the action appears incorrect, the recipient can request a fair hearing. If the request for the fair hearing is made within 10 days of the date of the notice, the public assistance benefits should continue at the same level until a fair hearing decision is rendered. *Source Book*, Section VII-E-1. This is called "aid continuing" and guarantees that the recipient will have support pending the decision. Thus, it is very important to request the fair hearing within the 10 day period. But if the client loses the case, DSS may recoup the monies paid during "aid continuing."

Requests for fair hearings may be made by telephone, in person or in writing. We recommend that any oral request be followed up with a written confirmation. The need for aid continuing should also be mentioned. If aid continuing is not granted, contact the welfare center, or consult an advocacy organization.

What is a face-to-face recertification?

A face-to-face recertification is a personal interview between the DSS worker and a recipient to make sure that the recipient is still eligible for benefits. *Source Book*, Section V-C-1. Clients must attend this meeting and bring requested documents or their public assistance may be discontinued. If a client, for good reason, cannot attend the face-to-face, call DSS and arrange for another time.

When may a minor be paid benefits directly?

Minors sixteen and over may be paid benefits directly if they live alone or with relatives.

Must minors report changed circumstances?

Everyone who receives government assistance benefits is required to report changes in their situation to appropriate agencies (for example, the Welfare Center, the Social Security Administration, etc.). In general, young persons should report any changes which might affect their eligibility. For example, if public assistance recipient starts working, he or she should report that fact to his or her caseworker. Such a report may not result in immediate termination, since there are provisions for a disregard of certain income; however, a recalculation of benefits is likely.

Similarly, if a young person is receiving Social Security benefits based on his or her status as a full-time student, he or she must report to Social Security if he or she stops attending school.

If such a change is not reported, it frequently results in a later determination that the young person was overpaid and the agency involved is likely to seek repayment of incorrect payments. In some cases, criminal fraud charges could be brought. It is important that legal counselling be sought where a young person is called in for a "Fraud Interview" or otherwise appears to be at risk of being accused of receiving benefits to which he or she was not entitled based on failure to make a required report.

CHAPTER IV

MINORS AND SCHOOL

Introduction

Few would deny that the education of the young is one of the most important functions of government or that the minor who fails to obtain a high school diploma has virtually no chance of sharing in the material wealth of our society. Thus, the relationship of the minor to the educational institutions of our society assumes critical importance. In this section, we discuss the following:

- Right to Attend School
  - —Generally
  - —Compulsory Attendance
  - —Handicapped Students
  - —Deinstitutionalized Students
  - —Children Leaving Foster Care
  - —Undocumented Children (immigration)
  - —Students with AIDS
  - —Pregnant Students
  - —Student Parents
  - —Students Not Living With Parents
  - —Homeless Children

- Education of the Handicapped
- Immunization
- School Records
- Suspensions and Corporal Punishment
- School Discipline-Special Situations
- Employment Certificates
- Interschool Athletic Activities
- High School Diplomas, Remediation, General Equivalency Diplomas, and Local Certificates
- College Financial Aid
- Educational Malpractice.

Unless otherwise noted, this section refers to public schools.

Attendance

Attendance-Generally

A person between 5 and 21 years of age, inclusive, who has not received a high school diploma is *entitled* to attend public school in the school district in which he or she resides. *Education Law* § 3202. Even if a person drops out of school, he or she may re-enroll if under 21 years of age. However, students may not necessarily attend any school of their choosing. For example, there may be some schools for which there are special entrance criteria such as a minimum score on an entrance exam. Students not meeting the entrance criteria probably do not have the "right" to attend these schools, assuming such requirements do not have the effect of illegally discriminating against students on the basis of race, sex, ethnicity or creed.[1]

---

[1] Matter of Gail and Serena Feldman, 20 Ed. Dept. Rep. 282 (1977).

But a student is entitled at least to attend a school within the district. Students do not have the right to attend schools in a district other than that in which their parents reside, except under limited circumstances (see below). For purposes of calculating ages, a school district is not required to admit a student whose fifth birthday falls after December 1 of the school year in which the student seeks admission unless the school has a policy which permits enrollment before this date. *Education Law* § 3202. Also, a 21 year old may attend school for the entire school year as long as he or she does not turn 21 before the start of the school year.

Compulsory Attendance

Not only are certain persons entitled to attend school, but students between 6 and 16 *must* attend school. *Education Law* § 3205.[2] Failure to do so could result in a PINS petition (see "Persons In Need of Supervision") being filed against the young person or in a child maltreatment petition (see "Child Maltreatment") being filed against the parents. The Commissioner of Education has held that "[w]here school district personnel are made aware of a nonattending child and cannot obtain parental cooperation to have the child attend school, a referral to Family Court must be made."[3]

There are, however, several exceptions to the compulsory attendance law. First, a minor who has completed a four-year high school course of study is exempt. Second, a minor who is eligible for a full-time employment certificate may be permitted to attend school part-time but in no event for less than 20 hours per week. Education Law § 3205. In addition, one court has refused to require that a minor under 16 attend school where she was legally married and wished to maintain a household for the benefit of her husband.[4]

On occasion, parents seek to keep their children home and provide them with alternate instruction. This practice is generally disfavored, and the parent will bear a heavy burden of showing that the instruction provided is substantially equivalent to the instruction that the child would receive in school.[5]

Parents do not have the right to demand that their child be allowed to attend school part-time, or to be released from school early, or to select the hours of school attendance.[6] Nor does the parent have the right to select their child's teacher,[7] or the particular class to which their child is assigned.[8] Nor do students have these rights. (Different rules apply for handicapped children. See "Special Education.")

Students may be allowed, however, to release time from school for up to one hour per week during school hours at close of either morning or afternoon sessions for religious instruction on the consent of their parents. The instruction must be maintained by a duly constituted religious body. The constitutionality of "release time" has been upheld by the courts.[9] Also, schools may establish optional courses for high school students, on the consent of their parents, to attend a course in religion at a registered nonpublic school. 8 N.Y.C.R.R. § 109.2.

Handicapped Students

Handicapped students have the same right to attend school, and are subject to the same compulsory attendance law as "non-handicapped" students, regardless of the severity of their handicap (see "Special Education").

---

[2] Certain school districts may raise the age of compulsory attendance to seventeen. See *Education Law* § 3205(3).

[3] Matter of Handicapped Child, 19 Ed. Dept. Rep. 387, 389 (1980).

[4] In re Rogers, 234 N.Y.S.2d 172 (Fam. Ct. Schuyler Co., 1962).

[5] In re. H., 357 N.Y.S.2d 384 (Fam. Ct. Yates Co., 1974); Matter of Baum, 401 N.Y.S.2d 514 (2d Dept. 1978); see also 8 N.Y.C.R.R. § 100.10.

[6] Matter of Bland, 23 Ed. Dept. Rep. 327 (1984).

[7] Matter of Shepard, 21 Ed. Dept. Rep. 669 (1982).

[8] Matter of Ferran, 21 Ed. Dept. Rep. 473 (1982).

[9] Zorach v. Clauson, 343 U.S. 306 (1952).

Deinstitutionalized Students

Students coming out of institutions, including psychiatric centers, developmental centers, training schools, facilities operated by the Division for Youth, schools for delinquent, dependent and neglected children, and all other residential treatment centers have the right to attend school in the district in which they reside. *Education Law* § 3202.

Children Leaving Foster Care

Children coming out of non-institutional foster care have the same right to attend school in the district in which they reside as all other students. *Education Law* § 3202.

Undocumented Children

All children have a right to attend school without regard to their immigration status or that of their parents. This is the result of a 1982 Supreme Court decision entitled *Plyer v. Doe*.[10]

Students with AIDS

Students with AIDS should be allowed to attend school. In September 1985 Commissioner of Education Gordon M. Ambach urged that all school districts determine on a case-by-case basis the appropriate educational setting for school-aged youngsters with AIDS. Commissioner Ambach noted that both the United States Public Health Services and the New York State Health Department have determined that most school-age youngsters with AIDS pose no risk of transmission of the virus to others in the school setting. The Commissioner stated:

> In light of these conclusions by our leading public health authorities, the State Education Department urges that no child be excluded from school attendance solely because the youngster has been diagnosed as infected with AIDS. Instead, school authorities should review each case individually with the appropriate medical personnel and the child's parents to determine whether the youngster can be accommodated in a normal educational setting without undue risk to himself or others.[11]

Pregnant Students

Pregnant students may also attend school. When the student's medical condition no longer permits her to attend school, home instruction should be provided. 20 U.S.C. §§ 1681 - 1686; 34 C.F.R. § 106.40.

Student Parents

Student parents may attend school as may any other student. 20 U.S.C. §§ 16181-1686; 34 C.F.R. § 104 *et seq.*

Students Not Living With Parents

A question frequently arises whether a student who does not reside with his or her parents may attend school in a district other than that where the parents reside. This situation may arise when the student lives alone and is emancipated, or when the student lives with an adult other than the parent, for example, a relative. A school district might refuse to admit the student on the belief that since the residence of a minor is presumed to be that of the parent and since the parent does not reside in the district, the school is not required to educate the minor.

As an initial matter, the address of a student is presumed to be that of the parent. Thus, the great majority of students may attend school only in the district in which their parents reside. But this presumption is rebuttable, and there are several circumstances in which a student is allowed to attend school in a district other than that of the parents. First, students 18 or over are no longer minors and may establish their own residence, independent of their parents. Thus, students 18 or over cannot be denied admission on the basis that their parents reside in another district.

---

[10] Plyer v. Doe, 457 U.S. 202 (1982).

[11] AIDS mailing of Commissioner of Education.

Second, students who are emancipated from their parents may also establish their own residence and attend school in a district other than that of their parents.[12] (See "Emancipation.") It is important to note that the student need not have the permission of the parents to be emancipated, and the school may not require parental permission as a condition of accepting the student.[13]

A differences situation arises when the student lives with another adult. Several factors must be present before a district may be required to accept the student. As an initial matter, the school district should accept the student pending proceedings to determine if the student is actually a resident. "A determination of exactly who is the person or persons in parental relation to a student, while important, is not a condition precedent to the admission of a resident to a public school."[14]

If the adult is the legal guardian of the student, then the student must be allowed to attend school in the district in which the legal guardian resides. However, there is *no* requirement for an actual transfer of legal custody before a minor must be allowed to attend school in a district of an adult other than the parent.[15]

The minor must be allowed to attend school in the district of another adult if the other adult serves as a "custodian." Custodian is defined as a person who has assumed the charge and care of a minor because the parents or legal guardian have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted the minor or are living outside of the state or their whereabouts are unknown. *Education Law* § 3212.

Finally, a student should be allowed to attend school in the district of another adult even where the other adult is not a legal guardian or custodian, as defined above, if the parents of the young person have given up custody of the child. Again, formal legal guardianship is not required. A notarized document signed by the parents which surrenders custody permanently should suffice. The arrangement cannot be temporary, and cannot be arranged so that a student may take advantage of the education programs of another district.[16] Thus the child may not return home for weekends or vacations. The school will properly look for a *bona fide* transfer of custody.

The agreement should probably recite the reasons for the transfer of custody (i.e., family problems, or inability to care for the child), the fact that the transfer is permanent, and that the adult with whom the minor is to live accepts full financial responsibility for the minor.[17] The minor will bear the burden of proving that the transfer of custody is complete and permanent and was not done solely for the purpose of taking advantage of the programs of the school district. Parents must, however, consider the possible legal consequences of signing such a statement (i.e., the possibility of giving up control over a son or daughter).

Education of Homeless Children

In June of 1988, the New York State Commissioner of Education enacted regulations which clarify the rights of homeless children to attend school. See N.Y.C.R.R. § 100.2. A homeless child is defined as a child entitled to attend school who, because of the unavailability of permanent housing, lives in a hotel, motel, shelter or other temporary living situation, and the child (or the family) is receiving assistance or services from the department of social services.[18]

---

[12] Matter of Stillman v. School District and Board of Education of Rockville Centre, 60 Misc.2d 819 (Sup. Ct. Nassau Co., 1969); Matter of Tarkeall, 23 Ed. Dept. Rep. 475 (1984).

[13] Matter of Rounds, 23 Ed. Dept. Rep. 286 (1984).

[14] Mater of Rounds at 287.

[15] Simms. v. Roosevelt USFD, 420 N.Y.S.2d 96 (Sup. Ct. Nassau Co., 1979); Matter of Fichtner, 22 Ed. Dept. Rep. 119 (1982); Matter of Tunstall, 27 Ed. Dept. Rep. 144 (1987).

[16] Matter of Buglione, 14 Ed. Dept. Rep. 220 (1975); Matter of Fichtner, 22 Ed. Dept. Rep. 119 (1982).

[17] Matter of Staulcup, 20 Ed. Dept. Rep. 11 (1980).

[18] The definition does not include children placed by a court or children whose custody has been transferred to a local department of social services.

While there was little debate about the right of homeless children to attend school, there has been significant debate about where the child could attend. Was it in the school district where the child temporarily resided or the district where the child resided before becoming homeless? The whole debate centered around which district was required to incur the expenses of educating homeless children, with the districts where homeless children resided arguing that they should not be required to shoulder the costs. The sad result was that many homeless children were denied the right to attend school.

The new regulations resolve the issue of where homeless children may attend school. The parent (or person in parental relation) may choose either the school district of current location or the school district of last attendance before the child became homeless.[19] If there is no parent or person in parental relation, then the option is left to the homeless child. The new regulations, however, do not require school districts to provide out-of-district transportation.

There may be a third option available as well. School districts within a region may develop a regional placement plan, and designate a particular school to provide educational services to homeless children.

Last, the regulations give parents the option to change their initial placement decision, if done by the end of the first semester of attendance or within 60 days, whichever is later.

Special Education

State and federal laws guarantee that all children have the right to a free appropriate education regardless of handicap. In this section we discuss the special education system. We begin by providing a glossary of selected terms we will use throughout our discussion.

Committee on Special Education

The Committee on Special Education (CSE) is a multidisciplinary team whose primary function is the identification, classification, and placement of children with handicapping conditions. The CSE is composed of at least a school psychologist, a teacher or administrator of special education, a school physician and a parent of a handicapped child residing in the school district who is not employed by, or under contract with the district. The school physician need not be at attendance at any meeting of the CSE unless specifically requested by the parent within 72 hours of the meeting. *Education Law* § 4402.

Student with Handicapping Condition

A student with a handicapping condition is defined as a student who is entitled to attend school and "who because of mental, physical, or emotional reasons can receive appropriate educational opportunities from a program of special education." *Education Law* § 4401.[20] The classifications include:

Autistic
Emotionally disturbed
Learning disabled
Mentally retarded
Deaf
Hard of hearing
Speech impairment
Visual impairment
Orthopedically impaired
Other health-impaired
Multiply handicapped

---

[19] School districts which educate homeless children temporarily placed in their districts may obtain reimbursement for the costs of such education from the New York State Department of Education

Special Education

Special education means "specially designed instruction ... to meet the individual needs of pupils with handicapped conditions." 8 N.Y.C.R.R. § 200.1. Special education includes both educational and related services which must be provided at no cost to the parents.

Related Services

Related services are those services required to assist a handicapped child to benefit from special education. *Education Law* § 4401. These include:

audiological services
counseling services
medical services (as defined in regulations)
occupational therapy
physical therapy
psychological services
speech pathology.

Only those related services *required* to assist the handicapped student to benefit from special education need be provided.

Least Restrictive Environment

Handicapped students must be provided with the least restrictive environment appropriate to meet the student's needs, defined as placement which:

(1) provides the special education needed by the student;
(2) provides for education of the student to the maximum extent appropriate with other students who are not handicapped; and
(3) is determined following consideration of the proximity of the placement to the student's place of residence.

8 N.Y.C.R.R. § 200.1.

The list below proceeds from the least to the most restrictive environment:

- regular education with support services
- resource room
- special education class in a regular school with mainstreaming opportunities
- special education class in a school which serves only students with handicapped conditions
- residential programs
- hospital schools
- home instruction

Resource Rooms

A resource room is a special education program in which the student receives special education instruction for a minimum of one period per day and a maximum of 3 hours per day up to 50% of the day. These classes may contain no more than 5 students. 8 N.Y.C.R.R. § 200.6.

Individualized Educational Program

An individualized educational program (IEP) is a written plan "which specifies the special education programs and services to be provided to meet the unique educational needs of a pupil with a handicapping condition." 8 N.Y.C.R.R. § 200.1. The IEP is developed in two phases. The following must be set forth during the first phase:

> Recommendation - The recommended special education program and all related services, if any, must be set forth. This should include mainstreaming opportunities. The recommendations must also set forth the date special education is to begin and the projected date for review of the special education program. The recommendations should also describe any specialized equipment and adaptive services needed for the student to benefit from the special education program. Also, if necessary, testing modification to be used by the pupil should be described;
>
> Present levels of performance;
>
> Test results;
>
> Other programs considered, the date of the annual review, and the projected date of the triennial reevaluation; and
>
> Program goals.

Phase two of the IEP, which is drawn up after the student begins the special education program, must include a statement of short term objectives consistent with the annual goals for the student and appropriate objective criteria and evaluation procedures and schedules for determining on an annual basis, whether the instructional objectives are being met. 8 N.Y.C.R.R. § 200.4.

Impartial Hearing

An impartial hearing is a proceeding which takes place when there is disagreement between the parent and the CSE. This could include, for example, whether a child should be evaluated by the CSE, whether the placement recommended by the CSE is appropriate, or whether the child should be evaluated by independent professionals not connected with the school. The impartial hearing is presided over by a hearing officer who cannot be an officer, employee, or agent of the school district.

CSE Process

How it Begins

The CSE process is begun by the referral to the CSE of a student suspected of having a handicapping condition. The referral may be made by a parent, a professional staff member of the school where the child attends, a licensed physician, a judicial officer, the student if over 18 or emancipated, or a public agency with the responsibility for the welfare, health and education of children. 8 N.Y.C.R.R. § 200.4. If the referral is made by a person other than the parent, student, or judicial officer, it must contain the reasons for the referral and attempts to remediate the student's performance, if any. Where there were no attempts, the referral must state why.

The CSE must then notify the parent in writing that a referral has been received. The required elements of the notice are set forth in the Commissioner's Regulations. If parents agree to have their child evaluated, then the process moves forward. The evaluation process and initial recommendations must be completed within 30 days of the consent or within 40 days of the referral, whichever is earlier. If the parent refuses to consent to the evaluation, the school may request an impartial hearing to require that the evaluation take place. The hearing officer is empowered to order that the evaluation take place, and the parent may appeal the decision. The student remains in his or her current educational placement pending these proceedings, unless the parent and school agree otherwise.

Evaluation

The evaluation, which is provided at no cost to the parent, should include:

- a physical examination in accordance with Section 902 of the Education Law
- an individual psychological evaluation
- a social history
- other suitable examinations and evaluations as may be necessary to ascertain the physical, mental and emotional factors which contribute to suspected handicapping conditions.

A student has the right to be tested in his or her primary language. The parent has the right to submit, and the CSE must consider, outside evaluations. The parent has the right to obtain an independent evaluation at the school's expense if the school's evaluation was inappropriate or incomplete. Before obtaining the independent evaluation, the parent should notify the school and give the school a chance to request an impartial hearing to challenge the need for the evaluation. If the school does not request a hearing, then it must pay for the independent evaluation. 8 N.Y.C.R.R. § 200.5; *Matter of Board of Education*, 25 Ed. Dept. Rep. 145 (1985).

After the evaluation, the CSE must develop a written recommendation which indicates the reasons for determining that a child does not have a handicapping condition or, if the child is determined to have a handicapping condition, the following must be set forth:

- the present levels of performance and the student's individual needs;
- the classification of the handicapping condition;
- the annual goals for the student;
- the recommended program, the class size if appropriate, and mainstreaming opportunities;
- the specialized equipment and adaptive services required;
- the projected date for initiation of services; and
- appropriate testing modifications.

8 N.Y.C.R.R. § 200.4(c)(2).

This information will be set forth on an Individualized Education Plan (IEP), a document which defines a student's needs, establishes educational goals and objectives, and describes the programs designed to meet those needs. If the parent disagrees with the classification decision or recommended special class placement, the parent may request an impartial hearing.

Placement

If the CSE finds that a student needs special education, it then has thirty days from that finding to arrange for an appropriate placement. The placement must be geared to meet the individual needs of the student. Parents have the right to visit and inspect the recommended program to determine whether it is appropriate to meet the needs of their child. Parents who disagree with the program recommendation will probably be offered a meeting with the CSE to discuss their concerns. If the CSE and the parent continue to disagree on the placement recommendation, the parents may request an impartial hearing. The student remains in his or her current placement pending the hearing unless the parent and the CSE agree otherwise.

Impartial Hearings

Impartial hearings are presided over by hearing officers who are paid by the school district, but who otherwise are not employees of the district. The hearing is rather formal and a stenographic transcript or a recording of the proceedings will be made. The CSE has the burden of demonstrating the appropriateness of its recommendations. Initially the CSE presents witnesses to testify concerning the reasons for its recommendations. The parent has the right to cross-examine these witnesses. Then the parents present their case on why the CSE's recommendations are in error. The parent may call witnesses in support of their position. All witnesses will be subject to cross examination.

The hearing officer should issue a written decision within 45 days of the conclusion of the hearing. If the parents are not satisfied with the decision, they may appeal to the Commissioner of Education, or, possibly, to the courts. Parents who prevail in their appeal may be awarded attorneys' fees.

Frequent Special Education Questions

When is the IEP prepared, and what is a parent's role in its preparation?

The IEP is prepared in two phases. The first section is completed by the CSE before the student enters the special education program, and includes, for example, program recommendations, related services, testing results, other programs considered, the date of annual review, and the projected date of the triennial re-evaluation. It should also include goals of the program, both in terms of academics and social and physical development. The second section of the IEP is prepared after the child enters the program, and should set forth short-term instructional objectives, how there are to achieved, and how results will be evaluated. The parents have the right to participate in the development of each phase.

How often is a handicapped student's program reviewed?

A student's program must be reviewed at least annually by the CSE. This is to minimize the possibility of students languishing in inappropriate special education programs.

How often should a handicapped student be re-evaluated?

Special education students must be re-evaluated at least once every three years. Again, this is to prevent students from languishing in inappropriate special education programs.

How long does the CSE have to evaluate a student after the parents consent to a referral?

The CSE has thirty days to evaluate a student after the parents consent to a referral or 40 days after the referral, whichever is sooner. Once the evaluation is completed, and assuming special education is recommended, the CSE has thirty days to arrange for a placement. If the CSE fails to arrange a placement within those thirty days, the parents may have the right to private school placement.

What program does a student attend pending the CSE process?

Students have the right to remain in their current educational placement pending the exhaustion of CSE procedures. The placement of a student may not be changed by the school unless the parent agrees. If a parent disagrees with the CSE recommendation, the placement of the student may not be changed unilaterally by the school until the parent has exhausted all appeals.

Does a parent have the right to visit a proposed placement?

Absolutely. In fact, parents must be urged to visit proposed placement before accepting a CSE recommendation.

What recourse do parents have when they disagree with a CSE decision?

Parents may request an impartial hearing whenever they disagree with a decision of CSE. Disagreements could include, for example, classification, placement, related services to be provided, or a change in a placement site.

Are handicapped students entitled to the best possible programs?

Unfortunately not. Handicapped students are entitled only to programs which are adequate to meet their special needs; they are not entitled to the optimum program.

May the school unilaterally change the placement of a disruptive special education students whose disruptive or dangerous conduct grows out of their disability?

Not without the consent of the parent. The United States Supreme Court considered this question in *Honig v. Doe*, 108 S. Ct. 592 (1988). In that case, an emotionally disturbed student assaulted another student. The Supreme Court held that, while the school may invoke its normal suspension procedures, it may not change the placement of the student. See also *Matter of Handicapped Child*, 25 Ed. Dept. Rep. 91 (1985).

May a parent unilaterally place a disabled child in a private school and obtain reimbursement from the school?

The answer to this question is quite complicated, but under certain circumstances the parent may do so. In a case where the private placement of the parents was appropriate to meet the child's special needs and the placement recommended by the public school was inappropriate, a court may order the school to continue the placement at public expense. A court could also order the school to pay for past tuition charges. See *Burlington School Comm. v. Department of Educ.*, 105 S. Ct. 1996 (1985). The Supreme Court, however, recently ruled that a State's (as contrasted with a school district) could not be held liable for part tuition charges. See *Dellmuth v. Muth*, 57 U.S.L.W. 4720 (1989). We recommend that a parent who is considering a unilateral placement first consult a knowledgeable attorney.

May a school graduate a special education student and thereby end its responsibility to provide the student with special education?

At least two courts have held that graduation is a change in placement for purposes of the special education law. *Cronin v. Board of Educ. of East Ramapo Central School Dist.*, 689 F. Supp. 197 (SDNY 1988). Thus, a parent could challenge the decision of a school to graduate a special education child and the child must be permitted to continue in school pending the exhaustion of the parent's challenge.

Must a school provide medical services to a disabled student if such services are necessary for the student to attend school?

The answer to this question depends on the nature of the medical services. If the service must be provided by a physician, then there is no such requirement. But certain other medical services can be required if such services are relatively simple. For example, in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), the United States Supreme Court ruled that the clean intermittent catheterization of a student was a medical service that could be provided. The Court stressed that the procedure was simple, required little training, and did not need to be done by a physician or a nurse. In *Detsel v. Board of Education of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2d Cir. 1987), however, an Appeals Court refused to require a school to provide respirator services to a disabled student. The Court stressed that the services were complicated, required the skills of trained health professionals, required constant monitoring, and could not be provided by the school nurse.

Immunization

Section 2164 of the Public Health Law requires that students attending any public, private or parochial child care center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school be immunized against polio, mumps, measles, diptheria and rubella. These immunizations may be performed by a private physician, but if the parent cannot afford a private physician, the county must bear the cost. The physician who administers the immunization must give the parent a certificate indicating the types of immunizations performed and the date of each. A child may not attend school for more than 14 days unless proof of immunizations is provided. This period may be extended to 30 days if the child is transferring into the school from out-of-town or from another county, and the parent demonstrates a good faith effort to obtain the necessary certification or other evidence of immunization.

There are two limited exceptions to the immunization requirements. If the immunization would be detrimental to a child's health, the immunization may be waived. This fact must be certified by a physician licensed to practice medicine in New York State. *Public Health Law* § 2164.

Also, the immunization requirement does not apply to children whose parent, or parents or guardian oppose immunization based on a sincerely held religious belief.[20] Parents who refuse to permit their children to be immunized where one of the exceptions does not apply, thereby preventing their children from attending school, could be charged with child neglect and find themselves subject to a child maltreatment proceeding. (See "Child Maltreatment.")

A parent does not have to belong to an organized religious denomination, but the parents' opposition to immunization must stem from sincerely held religious views, as contrasted with scientific views. While a "religious" view is not easy to define, courts tend to take a functional approach and look for a belief that is more than intellectual; that is the believer would categorically "disregard elementary self-interest … in preference to transgressing its tenets." *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943). Clearly, a parent's opposition to immunization will not be sustained if it stems primarily from biological concerns, even if cloaked in religious trappings. *Mason v. General Brown Cent. School District*, 851 F.2d 47 (2d Cir. 1988).

Perhaps even more difficult than defining a religious view is the evaluation of whether a religious view is sincerely held. The Court of Appeals for the Second Circuit has stated:

> Sincerity analysis seeks to determine the subjective good faith of an adherent … The goal, of course, is to protect only those beliefs which are held as a matter of conscience … [I]t is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief … Therefore, this analysis is most useful where extrinsic evidence is evaluated. For example, an adherent's belief would not be "sincere" if he acts in a manner inconsistent with that belief, or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.

Society of Krishna Consciousness, Inc. v. Barber, 650 F. 2d 430, 441 (2d Cir. 1981).

But a single inconsistent act will not suffice to deny an exemption, especially if credibly explained. According to the Court in *Lewis v. Sobol*:

> A person need not rigidly adhere to each and every tenet of his faith in order to qualify as a sincere believer. Religions, as most things, are practiced in degrees of adherence. [People] must be free to follow those religious principles they deem most important and no inference of insincerity may be found to flow from their failure to follow the whole gamut of their religious tenets. Were it otherwise, any deviation from established religious norms would brand the schismatic a heretic. It is not for the Court to determine how devout a follower is; rather, it need only determine that a sincere religious belief underlie their present claim.

Lewis v. Sobol, 710 F. Supp. 506, 515 (S.D.N.Y. 1989) *quoting Allanson v. Clinton Cent. School Dist.*, No. 84-174, Slip. Op. at 15 (N.D.N.Y. May 7, 1984).

For a case where the court found a claimed religious belief not to be sincerely held, see *Sheer v. Northport - East Northport Union Free School District*, 672 F. Supp. 81 (EDNY 1987).

---

[20] Previously, parents had to show that they were *bona fide* members of a recognized religious organization whose leadership did not permit immunization. This was declared unconstitutional in Sherr v. Northport - East Northport Union Free School District, 672 F. Supp. 81 (EDNY 1987).

School Records

Introduction

The Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232 *et seq.* (commonly referred to as the "Buckley Amendment"), governs the collection, review and dissemination of school records of public and private schools which receive funds through the Department of Education, including colleges. The purposes of the Buckley Amendment are to assure that records kept on students and their families are accurate, and to limit the persons who may review or receive a student's records without the consent of the parent or student, where appropriate.

Access to School Records

The Act permits parents and certain students to have access to school records. This includes the non-custodial parent where the parents are divorced or separated. 34 C.F.R. § 99.3. Students who are over 18 years of age or older or who attend post-secondary school (hereinafter referred to as "eligible students") have full rights to inspect their records. Indeed, once a student becomes an "eligible student" under the law, parents no longer have the right to access to the student's records, or the right to consent to release of such records. Parents must obtain the consent of the student to view the records. (Schools commonly request such consents from graduating seniors.) A student under 18 who is attending elementary or secondary school does not have the right to inspect records although the school is permitted to allow such access. 34 C.F.R. § 99.3.

Eligible students may be denied access to psychiatric or treatment records (but may designate a physician or other appropriate professional to inspect the records), confidential letters of recommendation, and financial statements of parents kept by post-secondary schools. 34 C.F.R. § 99.11. The parent or eligible student has the right to personally inspect the record, but the school is permitted to have a school official present during the examination. A parent or eligible student may not remove documents from the file but may copy their contents. While the school generally is not required to provide a parent or eligible student with photocopies of the records, they usually will permit the parent to photocopy the records on premises. (See 34 C.F.R. § 99.11(b)(2) for instances where the school may be required to provide copies.) The school is permitted to charge the parent or eligible student for the cost of such copying but may not charge the parent for staff time in searching for or in retrieving the records. 34 C.F.R. § 99.8.

The entire record must be made available for inspection except for personal notes kept by teachers for their own use, and records kept by school security police solely for law enforcement purposes, if they are not revealed to anyone other than law enforcement personnel. Moreover, personnel records of school employees and records of a school to which a student has applied but never attended need not be divulged. 34 C.F.R. § 99.3.

Challenges to Inaccurate Information

If any information contained in the file is inaccurate, the parent or eligible student may request that it be removed. If the school refuses to do so, a hearing may be requested. The hearing must be before an unbiased hearing officer who may be an employee of the school district. At the hearing, the parent or eligible student may be represented by an attorney or an advisor, and may present evidence why the entry in the record is inaccurate. The hearing officer must render a decision in writing, based only on the evidence adduced at the hearing, which details the reasons for the decision. If the hearing officer determines that the information is inaccurate, it must be expunged or corrected. If the hearing officer determines that the information is accurate, the parent or eligible student may nevertheless enter a statement into the record detailing why he or she thinks the information is unfair or inaccurate. This statement must be included whenever the record is released. 34 C.F.R. §§ 99.20, 99.21.

Release of Records

A school record may not be released without consent of the parent or eligible student unless it is released to:

1. officials within the schools;
2. officials of the school to which the student is transferring;
3. various state and national education agencies;
4. student financial aid officials;
5. courts (pursuant to subpoena or order); and
6. appropriate persons when the student's health or safety demands the transfer of certain information.

34 C.F.R. § 99.31.

Last, the Buckley Amendment permits disclosure to the general public of "directory" information including name, address, telephone number, and academic major. The school must notify the parent or eligible student of such a directory and the information it will contain. The parent or eligible student may request not to be included in the directory. 34 C.F.R. § 99.3.

Summary

The Buckley Amendment provides parents and eligible students with the important right of inspecting school records. Schools are required to notify parents and eligible students of their rights under the Amendment but frequently do not. We recommend that these records be reviewed at least once a year to assure that they are accurate.

Suspension

Definition

A suspension is the forced exclusion of a student from school for behavior which is insubordinate or disorderly or which otherwise endangers the safety, morals, health or welfare of school personnel or students. *Education Law* § 3214. A suspension is a *formal* exercise of power. There is no legal basis for an informal suspension. (i.e., "You are suspended and don't return to school until you come in with your parents.") Nor is there any basis for an indefinite suspension or expulsion unless a formal hearing has been conducted. (For suspension from private schools, see "School Discipline-Special Situations.")

There are two types of suspensions - a principal's suspension and a superintendent's suspension. Each is described in greater detail below.

Principal's Suspension

Authority: The Board of Education, Board of Trustees, or sole Trustee may adopt by-laws delegating to principals the power to suspend for a period not to exceed five days. Only the principal may suspend, or if the principal is not in the school, the person designated at the acting principal.[21] A dean, teacher, or vice principal may not suspend a pupil unless designated the acting principal. Students suspended by a person other than the principal, or acting principal, should be immediately returned to school.

Procedure: Before a student is suspended, he or she should be advised of the reasons for the suspension and given an opportunity to explain his or her side of the story. This requirement is to prevent the possibility that the suspension is based on inaccurate information, such as misidentification.[22]

Where a student is suspended by the principal, the student and his or her parents shall, on request, be given the opportunity for an informal conference. At the conference, the parent may question persons involved in the incident which led to the suspension, including complaining witnesses. The conference should not, however, be viewed as a formal adversarial hearing and there is no right to representation by an attorney. A parent may be allowed to bring a person as an advisor depending on the policy of the school district. The conference should be viewed as an opportunity to plan cooperatively for the student's smooth adjustment back into the classroom.

---

[21] Matter of Labriola, 20 Ed. Dept. Rep. 74 (1980); Mater of Dennis, 19 Ed. Dept. Rep. 235 (1979).

[22] Goss v. Lopez, 419 U.S. 565 (1975).

Length of the Suspension: The suspension may be for only five days, after which the student must be allowed to return to school.[23] The principal may not reassign the student to another school, or place a student on home instruction as a result of the suspension.[24] (For involuntary transfers see "School Discipline-Special Situations.")

During the suspension, the student should receive alternate instruction. Schools may complain that it is not possible to arrange for home instruction because the suspension lasts only for five days, but this argument has been specifically rejected by at least one appellate court.[25] Indeed, this alternate instruction must amount to more than merely supplying a student with homework assignments; in *Turner v. Kowalski*, the supplying of homework assignments was found to be insufficient.[26] One court has stated that home tutoring would be required.[27] This requirement probably does not apply to suspended students above the age of compulsory attendance.

Summary: The rules, regulations, and bylaws of each school district must be consulted to determine if they grant any greater rights to students and parents than listed above. The information set forth above contains only the minimum requirement that a district must follow.

Superintendent's Suspensions

A superintendent's suspension is far more serious than a principal's suspension. The student is usually excluded from school for a greater length of time, and the results that may attend this type of suspension are far more serious, including possible expulsion. Because of this, we recommend that the parents of a student suspended by the superintendent seek outside assistance. This section is meant to familiarize the advocate with important concepts.

Authority: Only the superintendent may impose a superintendent suspension. This power may not be delegated to another unless the person is designated "acting superintendent" in the superintendent's absence.

Procedure Before the Suspension: The principal or the superintendent should meet with the student and advise the student that he or she is about to be suspended, the reason for the suspension, and then give the student an opportunity to explain his or her side of the story. These minimum due process requirements are meant to prevent unwarranted suspensions.[28]

Procedures After the Suspension: No student may be suspended for a period in excess of five days unless the student and parents are given the opportunity for a fair hearing. The requirement for the hearing cannot be avoided by the school by supplying the suspended student with home instruction.[29]

The student and parents must be given adequate notice of the hearing. This means that the reasons for the suspension must be sufficiently specific to afford the student notice of charges. "Mere repetition of the statutory language concerning the grounds upon which a student may be suspended is insufficient to afford the student reasonable notice of the charges against him."[30]

The notice of the charges and the date for the hearing must be given to the student sufficiently in advance of the hearing to allow time for preparation for the hearing. For example, in *Carey v.*

---

[23] Pitts v. Buffalo Board of Education, 378 N.Y.S.2d 190 (4th Dept. 1976).

[24] Johnson v. Board of Education Union Free School Dist. #6 Manhasset, 393 N.Y.S.2d 510 (Sup. Ct. Nassau Co., 1977); Walton v. Board of Education City School District of Glen Cove, 328 N.Y.S.2d 932 (Sup. Ct. Nassau Co., 1972).

[25] Turner v. Kowalski, 374 N.Y.S.2d 133 (2d Dept. 1975).

[26] Turner at 133.

[27] Walton v. Board of Education, 328 N.Y.S.2d 932, 933 (Sup. Ct. Nassau Co., 1972).

[28] Gross v. Lopez 419 U.S. 565 (1975).

[29] Matter of Malpica, 20 Ed. Dept. Rep. 365 (1981).

[30] Matter of Dennis, 19 Ed. Dept. Rep. 235, 237 (1979).

Sovino,[31] 24-hours notice was found to be insufficient. However, the Commissioner of Education has ruled that 48-hours notice was sufficient where the suspended student did not ask for an adjournment at the hearing.[32] What is not made clear in the Commissioner's decision is whether the student would be allowed to return to school pending the adjourned hearing. The notice need not indicate potential witnesses against the student.[33]

At the hearing, the student has the right to representation by counsel. The student also has the right to cross examine witnesses, to present his or her own witnesses, and to present other evidence on his or her behalf. The student has the right to call witnesses who do not have direct knowledge of the events under consideration, for example, witnesses who would establish credibility.[34] The student does not have the right to a separate hearing if more than one student is involved, nor does the student have the right to have witnesses sequestered.[35] However, if the student seeks to have witnesses present during the hearing, that request should be honored unless the number of witnesses is too large or the school seeks to prevent the testimony of one witness from influencing the testimony of another. If the school chooses this latter option, its own witnesses may not be present during the hearing either.[36]

If the student is also subject to a criminal investigation, he or she may request an adjournment of the hearing in order to preserve the right against self-incrimination.[37] However, the student does not have to be allowed back in school pending the hearing if he or she requests an adjournment.[38] If, however, the adjournment is caused by the school, the student should be allowed back in school pending the new hearing.

The superintendent should preside at the hearing unless he or she designates a hearing officer for that purpose. The hearing officer may be an employee of the school district. The hearing officer or the superintendent has the authority to issue subpoenas to require witnesses to attend the hearing and to produce records if necessary.

A record, in the form of a tape recording of the hearing or stenographic transcript must be kept. The school is not required to furnish the student with a transcript of the hearing, but must allow the student access to the tape recording.[39]

At the hearing, it must be shown by competent and substantial evidence that the student in fact engaged in the alleged misbehavior.[40] Hearsay evidence alone is not sufficient.[41] By hearsay we mean the student's guilt cannot be established solely by people who heard of the events from others. There must be testimony by witnesses who directly observed the events.

The hearing officer makes findings of facts and recommendations as to the appropriate measure of discipline, if any. The superintendent, however, is free to accept such findings and recommendations, or to make his or her own. The anecdotal record of the student may be considered by the superintendent for purposes of the proper disposition of the case but only on notice to the student.[42] (An anecdotal record, most commonly, consists of notations by school authorities of other "misbehaviors" in which the student is alleged to have been involved.)

---

[31] Carey v. Savino, 397 N.Y.S.2d 311 (Sup. Ct. Allegany Co., 1977) (24-hours notice is insufficient).

[32] Matter of Labriola, 20 Ed. Dept. Rep. 74 (1980).

[33] Matter of Spink, 25 Ed. Dept. Rep. 129 (1985).

[34] Matter of Klug, 20 Ed. Dept. Rep. 134 (1980).

[35] Matter of Vassar, 22 Ed. Dept. Rep. 284 (1982).

[36] Matter of Wilkins, 19 Ed.Dept. Rep. 190 (1979).

[37] Matter of Wehner, 22 Ed. Dept. Rep. 661 (1983).

[38] Matter of Vassar, 22 Ed. Dept. Rep. 284 (1982).

[39] Matter of Richards, 19 Ed. Dept. Rep. 43 (1979)

[40] Matter of Dennis, 19 Ed. Dept. Rep. 235 (1979)

[41] *Ibid.*; but see Matter of Wehner, 22 Ed. Dept. Rep. 661 (1983).

[42] Matter of Dennis, 19 Ed. Dept. Rep. 235 (1979).

A superintendent may not delegate the decision regarding the proper punishment to be imposed if the suspension is upheld. In *Matter of Richards*,[43] a student was suspended for the duration of the school year after the hearing. The superintendent further decided that the student's readmission to school for the next school year would be made by the director of pupil personnel at the beginning of that school year. This disposition was ruled an illegal delegation of authority. Similarly, readmission to school on a probationary basis is not permissible. A school may not impose further disciplinary sanctions for new acts of misconduct without affording the student the protections of the suspension statute.[44]

A student dissatisfied with the decision of the superintendent may appeal to the Board of Education. The Board may conduct its own hearing, or appoint a hearing officer to do the same. The hearing officer, if any, may make findings of fact or recommendations as to discipline, but the Board is free to substitute its own findings of fact and measures of discipline. Each member of the Board, however, must review the testimony and evidence of the case. It is improper for school district staff to be present when the Board makes its determination or to have *ex parte* communications with the Board.[45] The Board must have a quorum present before it may dispose of a suspension.[46]

Alternate Instruction: A student, if of compulsory school age, must be provided with alternate instruction both during the suspension period, and after the hearing in the event that the suspension is continued. Although the alternate instruction need not match in every respect the program previously offered to the student, it must provide the student with a meaningful education.[47] Thus, a student who was taking Spanish, for example, must be provided with Spanish as part of the alternate instruction.

Summary: The requirement set forth above are the minimum requirements of state law. A school district may have procedures which grant students greater rights than those listed above. Thus the advocate is strongly advised to consult local district procedures regarding superintendent's suspensions.

Corporal Punishment

The Board of Regents has banned the use of corporal punishment in New York State. The Commissioner of Education has promulgated a regulation to give effect to this policy. The regulation states:

> No teacher, administrator, officer, employee or agent of a school district in this State, or of a board of cooperative education services in this State, shall use corporal punishment against a pupil.
>
> [C]orporal punishment means any act of physical force upon a pupil for the purpose of punishing that pupil.
>
> The regulation then sets forth exceptions to the ban on the use of physical force. It states:
>
> In situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed, [this regulation] shall not be construed to prohibit the use of reasonable physical force for the following purposes:
>
> (1) to protect oneself from physical injury;

---

[43] Richards, 19 Ed. Dept. Rep. 43 (1979).

[44] Matter of Labriola, 20 Ed. Dept. Rep. 74 (1980).

[45] Matter of Klug, 20 Ed. Dept. Rep. 134 (1980).

[46] Curry v. Board of Education, 303 N.Y.S.2d 760 (Sup. Ct. Nassau Co., 1969).

[47] Matter of Malpica, 20 Ed. Dept. Rep. 365 (1981).

(2) to protect another pupil or teacher or any other person from physical injury;
(3) to protect the property of the school or others; or
(4) to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.

8 N.Y.C.R.R. § 19.5

School Discipline-Special Situations

In-School Suspensions

An "in-school" suspension occurs when a student is allowed to remain in school but is segregated from other students or a particular teacher. The Commissioner of Education has ruled that the suspension statute does not apply to an "in-school" suspension. In *Matter of Watts*,[48] the student was having a difficult time with a particular teacher. The student was suspended from school for 5 days, after which she was returned to school. Special arrangements were made for the student to receive instruction in a room by herself for the subject involved to avoid further problems with the particular teacher. The Commissioner ruled that this "in-school" suspension and "other similar disciplinary steps do not require full hearings" but can be "imposed only with a procedure which is basically fair and which grants the student and parent an opportunity to appear informally before [the principal] in order to discuss the conduct being reviewed."[49]

Suspensions for Truancy

Surprisingly, some school districts punish students who are truant from school by suspending, expelling or simply dropping them from the school roll. This practice is probably illegal, especially if the student is of compulsory school age.[50] Moreover, a student over compulsory attendance cannot be dropped from enrollment unless the student has been absent for 20 consecutive school days and the student and parent are given notice of an informal conference to discuss the reasons for the student's absences and whether a program change would assist the student. Even where a student is dropped from the rolls, the student must be informed that he or she has the right to re-enroll at any time. *Education Law* § 3202(1-a). One court, however, has upheld the practice of dropping truant students from the school roll if they are above the age of compulsory attendance.[51] (Suspension for truancy is not permitted in New York City even if the student is above compulsory attendance age.)

The Commissioner of Education has stated that a student's poor attendance record may form the basis for a lengthy suspension, particularly where the student has been warned several times and persists in unauthorized absences.[52] This ruling must be considered of suspect legality, at least as applied to students who are subject to compulsory attendance laws.

Suspension for Conduct Which Occurs Off School Grounds

Questions frequently arise about the authority of a school to suspend a student for conduct which occurs off school grounds. In *Matter of Pollnow*,[53] the Commissioner of Education upheld the suspension of a student who had assaulted several teenagers off school grounds on the basis that, since the teenagers were students in the school, the suspended student could properly be found to endanger the safety, morals, health and welfare of others. There must be proof by direct testimony that the student is guilty of the charges and that such conduct "actually disrupted the educative process, or [the student's] mental or physical condition endanger[s] the health, safety or morals of other pupils."[54]

---

[48] Matter of Watts, 23 Ed. Dept. Rep. 459 (1981).

[49] Watts at 460-461

[50] King v. Farmer, 424 N.Y.S.2d 86 (Sup. Ct. Westchester Co., 1979).

[51] George v.Fiore, 308 N.Y.S.2d 744 (Sup. Ct. Erie Co., 1970)

[52] Matter McCaffrey, 19 Ed. Dept. Rep. 49 (1979).

[53] Matter of Pollnow, 22 Ed. Dept. Rep. 547 (1983).

In *Howard v. Clark,*[55] the issue presented was whether a student could be suspended after the student was arrested for use of heroin. The court recognized that while the use of heroin by a student could "bear a reasonable relation to and may endanger the health, safety, and morals of the other students," the bare charges alone do not justify a suspension without some sort of factual showing of that relationship. The school failed to make such a showing of that relationship and thus the suspension was overturned.

Similarly, the Commissioner overturned a suspension based on an assault of a person who was in no way connected with the school and which occurred off school grounds. In *Matter of Pollnow,*[56] the Commissioner stated that where an assault does not take place on school property and the victim is in no way connected with the school, the assault cannot serve as the basis for suspension. (Note: This case involved a different offense by the same student as in the *Pollnow* case cited above.) The decision of the Commissioner was upheld in *Board of Education v. Ambach.*[57]

Cheating

A student may not be penalized for cheating unless there is competent and substantial evidence that the student in fact did cheat. While the student may not have the right to the type of hearing required by the suspension statute, there must be a sufficient basis upon which a school determines that the student cheated. For example, in *Matter of Pellinger,*[58] the school asserted that the student was observed talking during a final examination, and, thus, was accused of cheating and given a zero for the test. The school never questioned the student involved or any other students. The proctor did observe one student talking, but never observed the student in question talking; she could only observe the back of his head. Finally, there was no indication that the answer sheets were compared or that there was any pattern to their answers to similar questions on the examination. Under these circumstances, the Commissioner of Education refused to uphold the school's determination that the student cheated on the final examination.

Suspension from Summer School

The suspension statute does not apply to students attending summer school. A student attending summer school may be suspended without a hearing and other due process protections mandated by *Education Law* § 3214. The basis for this rule is attendance at summer school is "voluntary."[59] However, even without statutory direction, some due process protections would nevertheless be required. At a minimum, the student must be given the opportunity to meet with the principal to discuss the misconduct upon which the disciplinary action was based. A principal could not suspend a student based simply on whim or caprice.

Suspension from Extra-Curricular Activities

The suspension statute does not apply to the suspension from extracurricular activities, such as band, cheerleading, or sports. In *Buhlman v. Board of Ed. of Ramapo Center. School,*[60] several students challenged their suspensions for a period of six weeks from the school's hockey team following an investigation of training rule violations. The court found that, while the students were not entitled to the protections of *Education Law* § 3214, they were entitled to some opportunity to be heard regarding the events which predicated the disciplinary action. In *Buhlman*, each student was questioned by the coach regarding the infractions and later by the school principal. Each student, except one, admitted violating the training rules. Under the circumstances, the court ruled that the requirements of due process were satisfied.

---

[54] Matter of Rodriguez, 8 Ed. Dept. Rep. 214 (1969).

[55] Howard v. Clark, 299 N.Y.S.2d 65 (Sup. Ct. Westchester Co., 1969)

[56] 21 Ed. Dept. Report. 291 (1981)

[57] Board of Education v. Ambach, 465 N.Y.S.2d 77 (3rd Dept., 1983).

[58] Matter of Pellinger, 20 Ed. Dept. Rep. 53 (1980).

[59] Application of Olson, 242 N.Y.S.2d 1002 (Sup. Ct. Nassau Co., 1963).

[60] Buhlman v. Board of Education of Ramapo Central School District, 436 N.Y.S.2d 192 (Sup. Ct. Rockland Co., 1981).

A student could possibly challenge a suspension from an extracurricular activity if the school violates its own regulations in imposing the suspension. For example, if the school handbook prescribed a one week suspension from extracurricular activities for smoking in school, a longer suspension for smoking would be improper (see "Forfeiture of Varsity Letter" below).

Last, the Commissioner of Education has stated that the rules of conduct do not have to be written and may be communicated orally to the student.[61] But new rules adopted by the Board of Regents require that disciplinary codes be written (see "Disciplinary Codes").

Forfeiture of Varsity Letter

The suspension statute does not apply to the forfeiture of a Varsity Letter. In *O'Conner v. Board of Education*,[62] the school required a student to forfeit his varsity letter after he was observed at a Knights of Columbus dinner drinking a beer. (He was old enough to drink at the time.) The court found that while *Education Law* § 3214 did not apply, the school must adopt a procedure which grants the student the opportunity to appear informally before the school authorities and discuss the factual situation underlying the threatened disciplinary action. In this case, the student was allowed to retain his varsity letter because the violation was not found to be "flagrant" as required by the rules of the school. Similarly, a student may not be denied athletic awards for misconduct without being afforded minimal due process so that the student or his parent is allowed to be heard with regard to the disciplinary actions.[63]

Graduation Exercises

Students may not be arbitrarily denied the privilege of participating in graduation exercises. While the suspension statute may not apply to this situation, the student and parent must be given the opportunity to meet informally with the principal and discuss the misconduct which led to the disciplinary action. There must be some relationship between the misconduct and the denial of the privilege to participate in the exercise.

For example, in *Matter of Murphy*,[64] the school, pursuant to its bylaws, sought to prevent a married student who was pregnant from participating in the graduation of her class solely on the basis of her pregnancy. The school argued that it was attempting to preserve traditional values and sought to protect other students from what it perceived to an "undesirable" example. The Commissioner of Education refused to uphold the action of the school board, finding that it was arbitrary and capricious.

Pledge of Allegiance

A student may not be suspended for refusing to pledge allegiance to the flag, nor may any other disciplinary action be taken against the student, as long as the student's refusal does not interfere with the rights of others. The student's exercise of this First Amendment right cannot be made contingent upon parental consent, although the school may notify the parents of a student who refuses to pledge to the flag.[65] Students may, according to the Commissioner of Education, be required to stand silently or leave the classroom during the pledge to the flag.[66]

---

[61] Matter of Petro, 23 Ed. Dept. Rep. 433 (1984).

[62] O'Conner v. Board of Education, 316 N.Y.S.2d 799 (Sup. Ct., Herkimer Co., 1970).

[63] Matter of D'Angelo, 23 Ed. Dept. Rep. 167 (1983); see also Matter of Hollenbaek, 26 Ed. Dept. Rep. 403 (1987).

[64] Matter of Murphy, 11 Ed. Dept. Rep. 180 (1972).

[65] Matter of Bustin, 10 Ed.Dept. Rep. 168 (1971).

[66] Matter of Bielenberg, 9 Ed. Dept. Rep. 196 (1970).

School Prayer

Students may not be required to participate in prayers, devotional readings, or particular hymns in the nature of prayers.[67]

Lateness

A student may be disciplined for lateness, but a school may not have a rule which automatically punishes a student for lateness regardless of the reason. The school must give the student some opportunity to explain the reason for the lateness and may not impose a penalty if the reason is valid. For example, in *Matter of Dengel*,[68] a student was required to serve detention due to lateness. The facts showed that the student was driven to school by her mother, and the lateness was due to the mother's car having slid into a snowbank on the way. The school had a policy of detention, regardless of the reason of lateness. In overturning the policy, the Commissioner of Education stated that schools may not avoid the responsibility of consideration of the explanation of lateness in each case "by the adoption of a rule that imposes punishment arbitrarily and without regard to the facts or any consideration of extenuating circumstances."

Suspension from Bus Transportation

The Commissioner of Education has ruled that even where a student is statutorily entitled to transportation, that entitlement is not the equivalent of the right to attend school. Thus, the Commissioner has ruled that the suspension statute does not apply to a suspension from bus transportation. The school must, however, provide the student and parent with an opportunity to appear informally before the person authorized to impose the punishment and to discuss the factual situation underlying the threatened disciplinary action.[69] Also, where a suspension from transportation is tantamount to a suspension from attendance because of the distance between the home and the school and the absence of alternate transportation arrangements, the school district must make appropriate arrangements to provide for the student's education. *Matter of Stewart*, 21 Ed. Dept. Rep. 654 (1982).

Dress Codes

Schools are not arbiters of taste or style and may not impose dress codes unless necessary for the health or safety of students. A school may, for example, require that long hair be tied back in a shop class where the student is using power tools. A school may not, however, require that its student athletes have short hair as a condition to participating in sports, or require a school uniform for participation in a physical education class.[70]

Relationships of Grades to Absences

School districts frequently impose academic sanctions upon students who are absent from classes. This could include reducing the student's grade in a given subject, or denying academic credit altogether. A school is given wide latitude in regulating the grading and promotion of students, but "may not subvert the purpose of grading (i.e., educational evaluation) by arbitrarily reducing a student's grades as a means of imposing discipline."[71]

In *Matter of Coleman*, the school had a policy that three illegal absences in a subject during a given marking period constituted a failure for that marking period; five illegal absences in a subject during a half year course would result in the student not being able to take the final exam or attend summer school; and nine illegal absences would result in the student not being able to take the final exam, the Regents exam, or being allowed to attend summer school. The Commissioner stated:

---

[67] Matter of Worthing, 3 Ed. Dept. Rep. 7 (1963).

[68] Matter of Dengel, 19 Ed. Dept. Rep. 68 (1979).

[69] Matter of Roach, 19 Ed. Dept. Rep. 377 (1980).

[70] Matter of Vartuli, 10 Ed. Dept. Rep. 241 (1971); Matter of Scally, 16 Ed. Dept. Rep. 243 (1977).

[71] Matter of Coleman, 23 Ed. Dept. Rep. 124, 126 (1983).

> [The school's] policy is automatic in its application and is premised solely upon whether or not the student's absence is excused. Such a policy is logically inconsistent, in that students who are legally absent have equally missed necessary work which ought to have been made up in some other fashion to avoid loss of credit or reduction in grade ....In addition, there is no indication that respondent's ... policy is applied so that a reduction in a grade is the result of absences so excessive as to affect academic performance or the result of failure to complete classroom work which forms, either wholly or in part, the basis of grade.[72]

Thus, "[t]o warrant an academic sanction, the misconduct must be directly related to the student's academic performance."[73] In *Matter of Caskey*, the Commissioner overturned a school's policy of automatically reducing a student's grade during a marking period for illegal absences.[74]

Similarly, a school may not impose an automatic grade reduction for lateness to school, even if the lateness is unexcused.[75] There must be some direct correlation between the lateness and the student's actual academic performance.

A school may, however, deny academic credit altogether for excessive absences or lateness, even if the absences and lateness are excused. In *Matter of Dickerson*,[76] the student appealed the denial of course credit for a health class for which she had passed the final exam. The student had missed 45% of the required class hours. The Commissioner stated:

> [A school] may require a reasonable amount of class attendance and is not required by law to waive attendance for pupils who are ill, even though such pupils may pass the final examination. ... The fact that other teachers may have given [the student] credit in other courses in which her attendance was equally meager does not compel her health teacher to do the same or compel the board to overrule the teacher.[77]

Late Homework Assignments

Students cannot be automatically punished for the submission of late homework assignments. In *Matter of Falcigno*,[78] the school refused to accept a student's term paper because it was turned in late. On Thursday, the day before the term paper was due, the student was allowed to leave school early because of illness. He did not attend school on Friday, the day the paper was due, because of a stomach disorder. The student submitted a written excuse from his mother on Monday but his teacher refused to accept his term paper. The Commissioner ruled that under the circumstances, punishing the student was unreasonable.[79]

Search and Seizures

School authorities are given broader discretion to perform searches of students. In *New Jersey v. T.L.O.*,[80] the Supreme Court ruled that a search by public school officials may be conducted without a search warrant or probable cause as long as the search is "reasonable" under all of the circumstances. In *T.L.O.*, a student was taken to the principal's office for smoking, which the student

---

72 Coleman at 126-27; see also Matter of Dickershaid, 26 Ed. Dept. Rep. 111 (1986).

73 Matter of Caskey, 21 Ed. Dept. Rep. 138, 139 (1981).

74 Ibid.

75 Matter of Gibbson, 22 Ed. Dept. Rep. 134 (1982).

76 Matter of Dickerson, 20 Ed. Dept. Rep. 132 (1980).

77 Dickerson at 133.

78 Matter of Falcigno, 22 Ed. Dept. Rep. 599 (1983).

79 Matter of Hassid, 23 Ed. Dept. Rep. 70 (1983).

80 New Jersey v. TLO, 469 U.S. 325 (1985).

denied. The principal demanded to see the student's purse. When he opened it, he found rolling papers. He then searched the purse and found marijuana, a pipe, plastic bags, index cards identifying students who owed the student money, and several letters implicating the student in marijuana dealing. The issue presented to the Court was whether the articles found by the principal could be introduced in a juvenile delinquency proceeding against the student. The Court ruled that the reasonableness of a search depends on whether there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the laws or rules of the school." The search is permissible "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[81]

The reasonableness of the search will depend to some degree on what area is being searched. For example, school officials probably have broad latitude to search school lockers because students do not "own" the lockers. A narrower authorization to search would apply to the student's pockets and a still narrower authorization would apply to a strip search of the student.

Disciplinary Codes

The Commissioner of Education has issued regulations which require that all school districts have a written policy on school discipline by January 1, 1986. 8 N.Y.C.R.R. § 100.2(l). The policy is to be developed with teachers, administrators, other school service professionals, students, and parents. Among other things, the written policy must include:

a) A Bill of Rights and Responsibilities of Students which must be provided to students on an annual basis.
b) A student discipline code which sets forth prohibited behavior and the range of punishments for infractions. Punishments must be appropriate to the offense and the record of the student.
c) Procedures to identify and resolve discipline problems.
d) Procedures for referral of special education students back to the Committee on the Special Education for reasons of conduct.

Censorship in High Schools

In 1969, the Supreme Court declared that students in public schools do not "shed their constitutional rights to freedom of expression at the schoolhouse gate." *Tinker v. Des Moine Independent Community School District*, 393 U.S. 503, 506 (1969). In *Tinker*, a high school student was suspended for wearing a black arm band in protest against the Vietnam war. The Court held that suspension for such a reason is improper unless the expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, at 509.

But under more recent pronouncements of the Supreme Court, it is clear that school authorities exercise broad powers of censorship at least where school-sponsored expressive activities are involved. For example, in *Bethel School District No. 403 v. Frasier*, 478 U.S. 549 (1986), the Supreme Court held that a school could censor a student speech which it felt was inconsistent with "its basic educational mission." In *Frazier*, the school deemed the student speech vulgar, although there is no question that it was not obscene by accepted legal standards. The Court ruled "[t]he determination of what manner of speech in the classroom or school assembly is appropriate rests with the school board." 478 U.S. 682.

More recently, the Supreme Court ruled that schools are permitted to censor school newspapers, so long as they exercise censorship for reasons reasonably related to pedagogical concerns. *Kuhlmeier v. Hazelwood School District*, 98 L. Ed. 592 (1988). In *Hazelwood*, the school censored two articles for the student newspaper. One dealt with the experiences of three Hazelwood students with pregnancy. The school expressed concern that, even though false names were used in the article, the identity of the students could be determined from the context. The school also felt that references to sexual activity and birth control were inappropriate for the younger students. The second article dealt with a student's experience with her parents divorce and the school was concerned that the identity of the parents could be determined.[82]

---

[81] New Jersey v. TLO, 469 U.S. 342; See also, People v. Overton, 301 N.Y.S.2d 479 (Ct. App. 1969).

Recently, the New York Commissioner of Education had occasion to consider the authority of schools to censor student newspapers. *Appeal of Eric Brenner*, No. 12153 (March 31, 1989). The Commissioner held that where school districts adopt policies granting student broader free speech protections that the Supreme Court has stated is required, then the school district is bound by that policy. In *Brenner*, the school district's power to censor was limited by school board policy to "instances where there was an imminent threat to disrupt the education process, or where the literary work was libelous or obscene." Because neither applied to the article in question, the Commissioner ruled against the school district.

The Commissioner has also ruled that a board of education may not suppress free expression by students unless it can be shown that suppression is necessary to avoid a material and substantial interference with the requirements of order and discipline in the operation of the school.[83]

Suspensions and Expulsions from Private Schools

The suspension statute described in the previous section, and the rights it affords to suspended students does not apply to students attending private school. Private schools are given very broad latitude in suspending and even expelling students. Only if the school violates its own rules, as contained in the school contract or disciplinary code, or if the school's decision is arbitrary, would a court be likely to require the school to re-admit the student. Rarely would a parent be given a tuition refund by the school after it validly dismisses a student, unless the school had a policy to this effect. In the first instance, parents and students must understand that often they are at "the mercy" of private school authorities. Second, if a student is dismissed, the parents and the student must examine closely the contract with the school and the disciplinary code of the school, if any, to ascertain if there are any grounds to reverse the decision.

Involuntary Transfers

A school may not involuntarily transfer a student to another school unless certain procedures are first observed. *Education Law* § 3214. The principal must send the parent notification that he or she is considering transferring the student. The notice must contain a time and place for an informal conference with the principal and must inform the parents of their right to be represented by counsel or an individual of their choice at the conference.

If, after the conference, the principal still seeks to transfer the student, he or she must issue a recommendation to the superintendent. The recommendation must include a description of the behavior and/or academic problems which support the need for a transfer, the alternatives explored, and prior actions taken to resolve the problems. A copy of the letter must be sent to the parents.

If the superintendent agrees that the transfer may be warranted, he or she must notify the parents of the proposed transfer, and of their right to a fair hearing to challenge the transfer. The notice letter must advise the parents that the transfer will not take place, except upon parental consent, for ten days, or until after a formal decision is rendered after the hearing, if requested. The hearing must be conducted in the same manner, and with the same protections as in suspensions hearings.

Employment Certificates

Persons who Must Obtain Employment Certificates

All minors, with the exception of those listed below, must obtain an employment certificate before they may work. *Education Law* § 3216.

---

[82] See also Poling v. Murphy, No. 88-5538 (6th Cir. 4/18/89) where a student was disqualified from running for a high school election after he had made a speech with contained discourteous and rude remarks about school officials.

[83] Matter of Beil, 26 Ed. Dept. Rep. 109 (1986).

When not required to be in school, minors 14 and older may work without an employment certificate in the following jobs:

1) caddy on a golf course
2) babysitter
3) yard work and household chores for private persons or non-profit, non-commercial organizations but the minor may not operate any power-driven machinery;
4) same as #3 but minors 16 and over may operate power-driven machinery ordinarily used in yard work or household chores.

When not required to be in school, minors 16 and older may work on a farm without an employment certificate.

A minor may work at school during lunch hours in the cafeteria without an employment certificate.

Minors 12 and over are permitted to work without an employment certificate for their parents on the home farm or other non-commercial outdoor work when not required to be in school.

Finally, a minor 16 and over and attending college may work for the college or for a fraternity or sorority or for a student or faculty association without an employment certificate. *Education Law* § 3215.

Special Work Permits - Farm Work

Minors 14 and 15 may work on farms if they first obtain farm work permits. Minors over 13 may harvest berries, fruits and vegetables if they first obtain a farm permit. *Education Law* § 3226.

Special Work Permits - Street Trades

"Street trades" include selling newspapers or periodicals on the street or shining shoes on the street. This does not include delivering newspapers. Minors under 14 may not be engaged in Street trades and minors 14 to 18 must first obtain special work permits to do so. A minor may not be engaged in a Street trade before 6:00 A.M. or after 7:00 P.M. (or thirty minutes prior to sunset, which ever is later) or when he or she is supposed to be in school. Minors engaged in Street trades may only do so for 4 hours per day on school days and 5 hours on other days. *Education Law* § 3227.

Special Work Permits - Newspaper Carriers

Minors 12 and older may work as newspaper carriers as long as they first obtain a work permit. The minor may not work before 6 A.M. and after 7 P.M. and may only work 4 hours on school days and 5 hours on other days. *Education Law* § 3228.

Special Work Permits - Child Performers

Children under 16 may not be engaged in musical, dance or theatrical performances or rehearsals, whether public or private, with or without payment, unless a special work permit is first obtained from the local government. This law does not apply to performances sponsored by schools, museums, or religious, civic or educational institutions or where the performance is not for more than 2 hours a week "from the studios of a regularly licensed broadcasting company, where the performance … is of a nonprofessional character" and occurs when the child is not required to be in school. *Arts and Cultural Affairs Law* § 35.01.

Special Work Permits - Child Models

A minor may not be engaged or used as a model unless a special work permit is first obtained from the school district. *Arts and Cultural Affairs Law* § 35.05.

Employment Certificates - Types

Minors 15 and over may obtain non-factory employment certificates which are not valid for factory work. Minors 16 and 17 may obtain general employment certificates.

A limited employment certificate is a certificate issued to a minor with physical disabilities and limited to enumerated occupations.

A special employment certificate is issued to minors 15 years of age and older who are found incapable of profiting from further instruction. It is unlikely that this type of employment certificate would still be issued. *Educational Law* §§ 3216, 3220, 3225.

Procedures for Obtaining an Employment Certificate

An employment certificate is obtained from the school district or from registered nonpublic secondary schools. The minor must present evidence of age, written consent of the parent or guardian and a certificate of physical fitness. If the minor seeks a full-time certificate, then the school's records must be presented as well. (Minors in New York City between 16 and 17 must present a pledge of employment as well.) *Education Law* §§ 3215-a, 3217.

The following would constitute proof of age:

-a certified birth certificate or record of baptism, or if unavailable
-a passport showing the age of the minor, or if unavailable
-other evidence of age which has been in existence for 2 years or more and is satisfactory to the school district.

Education Law § 3218.

The parent need not personally appear at the school unless the minor has not yet graduated from school and seeks a full-time employment certificate. *Education Law* § 3219.

The certificate of physical fitness must be given by a physician within one year of the application for the employment certificate. *Education Law* § 3220.

Interschool Athletic Activities

As a general rule, students may compete in senior high school athletic competition in each sport for four consecutive seasons after entry into ninth grade and prior to graduation. In those schools which permit seventh and eighth graders to compete in senior high school athletics, eligibility is for 5 consecutive seasons after entry into eighth grade, and six consecutive seasons after entry into seventh grade. 8 N.Y.C.R.R. § 135.4.

The purpose of this regulation is to prevent "red-shirting," that is, the practice of holding a student back a grade in order to extend the student's athletic eligibility. If, however, a student does not compete due to illness, accident or "other such circumstances deemed acceptable to the league . . . [,] such pupil's eligibility shall be extended accordingly." 8 N.Y.C.R.R. § 135.4(c)(7)(ii). In interpreting this phrase, one should look to circumstances which are essentially beyond the student's control.

For example, in *Matter of Board of Education*,[84] the student, in his sophomore year, participated in practice and two scrimmage games with his high school football team, but was unable to continue in any further activity with the team because he contracted mononucleosis. He did not attend school for one month. While he attained all passing grades in his subjects, the student decided to repeat his junior year due to the low grades he received. The Commissioner of Education found that the student's decision to remain in high school an additional year to enhance his chances of college admission was reasonable. Under the circumstances, the Commissioner ruled that the student's eligibility should have been extended.[85]

Students who turn 19 years of age before September 1 of the school year may not compete in interschool sports. This requirement cannot be waived.[86]

---

[84] Matter of Board of Education of The Babylon Union Free School Dist., 21 Ed. Dept. Rep. 109 (1981).

[85] Matter of Provost, 18 Ed. Dept. Rep. 284 (1978).

[86] Matter of Allen, 22 Ed. Dept. Rep. 255 (1982).

The Commissioner's regulations require that males and females be given an equal opportunity to participate in interschool competition. Where the school does not provide separate competition for males and females in a specific sport, a student cannot be excluded from competition solely by reason of sex. Special rules, however, apply to the sports of baseball, basketball, boxing, field hockey, football, ice hockey, lacrosse, rugby, soccer, softball, speedball, team handball, power volleyball and wrestling. The regulations require that girls trying out for the sports listed above must pass a physical examination and receive approval from a panel consisting of the school doctor, a physical education teacher, and, if the parents request, their own doctor. 8 N.Y.C.R.R. § 135.4(c)(7)(ii)(c).

Where a school provides for separate competition, females may still be permitted to participate in a sport organized for males, but males may be banned from participating on teams organized for females. Finally, where a team does not have separate competition for a specific sport, males may be banned from a team organized for females upon a finding that "such participation would have a significant adverse effect upon the opportunity of females to participate successfully in interschool competition in that sport." 8 N.Y.C.R.R. § 135.4(c)(7)(ii)(c)(3).

High School Diplomas

Deciphering the diploma requirements to obtain a local diploma or a Regents diploma is like negotiating a complicated maze. Rather than attempting to set forth the requirements, which can vary according to the year that a student first enters 9th grade, we strongly recommend that the student's guidance counselor be contacted to ascertain the specific requirements.

Remediation

The Board of Regents has enacted minimum requirements that students must meet before they will be granted a high school diploma. In order to help assure that students will master these minimum requirements, the Regents now tests students in the third, and fifth and sixth grades. Students who score below the statewide reference point on the pupil evaluation program must be provided with remedial assistance to enable them to score above the statewide reference point on the Preliminary Competency tests or the Regents Competency tests. 8 N.Y.C.R.R. § 100.3(b)(3). The parents of the student who is to be provided with remedial assistance must be notified in writing of their child's test results, and the plan for remedial instruction. The plan must be implemented no later than the semester after the test was given.

General Equivalency Diplomas

In order to be eligible to take the exam for the general equivalency diploma, the student must have lived in New York for one month prior to the exam and:

1. Be 19 years of age; *or*
2. Be 17 years of age and not have been enrolled in regular full-time high school program for one year prior to the examination, or shall be a member of a high school class which has graduated; *or*
3. Shall be enrolled in an alternative high school program equivalency program in accordance with the regulations of the Department of Education.

Students who have completed 24 credits or the equivalent as a recognized candidate for a college-level degree or certificate may be granted a GED without taking any exams. Students who take the exam in a language other than English must also take an English language proficiency exam.* Students achieving a score deemed satisfactory by the Commissioner of Education will be granted general equivalency diplomas. 8 N.Y.C.R.R. § 100.7

Certain students 16 or older but less than 18 are permitted to enroll in alternative high school equivalency preparation programs with parental permission. These include students who have not been on the regular school register of grade 9 for at least one school year and who score below the State reference point on any 5th or 6th grade pupil evaluation program tests. Also included are students who have fewer than 12 1/2% of the number of units of credit required by the school district for a local diploma multiplied by the number of years the student has been in grades 9-12. 8 N.Y.C.R.R. § 100.7.

Local Certificates

A school may award a certificate to students identified as having a handicapping condition. The school must first adopt written policies ensuring that handicapped students are provided with appropriate opportunities to achieve a high school diploma. Presuming such policies exist, a handicapped student may be granted a local certificate, if he or she has met the educational goals set forth in the individualized educational program, and the student has attended school for at least 13 years, excluding kindergarten, or the student has received substantially equivalent education elsewhere for such a period of time. The requirement of 13 years of school does not apply to mentally retarded children as defined in the Commissioner's regulations. The certificate must contain a statement that the student may continue to attend school until he or she has earned a high school diploma or has attained 21 years of age. 8 N.Y.C.R.R. § 105.6.

The failure of the Department of Education to exempt handicapped students from the requirement that students at least pass the Regents Competency exams in order to receive a diploma or to provide for the use of alternative testing techniques was unsuccessfully challenged in *Board of Education v. Ambach*.[87] However, handicapped students may have the right to certain testing modifications necessary to pass the exams.

Independence and Financial Aid

Young people living independently often do not receive financial assistance from their parents. These young people frequently encounter severe barriers when it comes to attending college. A question which frequently arises is whether a student's financial aid application will be evaluated based only on the student's income, or whether the student's parents' income will also be included. This usually depends on whether the student is viewed as "independent." There has been, however, much activity to limit severely the number of students who will qualify for aid based on their independent status. The fact that a student is completely emancipated oftentimes is insufficient. Some programs require involuntary dissolution of the family, while others require that the separation be for at least one year.

Each program has its own rules and guidelines concerning this issue, but some of the factors considered are:

- whether the student has reached a certain age (frequently 21, but sometimes higher);
- whether the student has been self-supporting for the past year or more;
- whether the student is a parent;
- whether the student is a recipient of public assistance;
- whether the student has established a household separate from his or her parents;

---

*Students who pass the general equivalency exam, but fail the English proficiency exam will receive a GED with a notation of the language in which it was taken.

[87] Board of Education of Northport-East Northport Union Free School Dist. v. Ambach, 60 N.Y.2d 758 (1983), aff'g 458 N.Y.S.2d 680 (1983).

- whether the student's parents have claimed the student as a dependent on their federal tax returns; and
- whether the family relationship has been involuntarily terminated (through abuse or other cause).

Young people should be advised to consult with their school's admissions or financial aid office concerning the factors which are used in the financial aid program for which they are applying. Many programs, such as TAP, have a separate questionnaire concerning independence, while in other programs, a letter from a professional describing the young person's living situation may be sufficient.

Educational Malpractice

New York State does not recognize claims of educational malpractice as the basis of lawsuits against school districts. In *Donohue v. Copiague Union Free School District*,[88] the leading case in this area, the student charged that the school district:

> gave to [him] passing grades and /or minimal or failing grades in various subjects; failed to evaluate his mental ability and capacity to comprehend the subjects being taught to him at ... school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test him in order to ascertain his ability to comprehend and understand [his subjects]; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps insofar as [he was] concerned in order to ascertain the [his] learning capacity, intelligence and intellectual absorption.[89]

The student claimed that, because of these failings of the school, although he had a certificate of graduation, he lacked "even the rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications for employment."[90]

The Court of Appeals, while recognizing that the student may have been injured as he claimed, refused to provide him with a legal remedy for his injuries. It held that the "[c]ontrol and management of educational affairs is vested in the Board of Regents and the Commissioner of Education." It was not the business of courts to sit in judgment of educational policies and their implementation.[91]

Students who are promoted through the educational system, but who do not learn minimal academic skills may not sue a school district for failing to provide them with an adequate education. The principles of Donohue have been extended to private schools and foster care agencies which are alleged to have failed in their duty to assure a ward's education at a school was adequate, and to schools which neglegently assess a student resulting in an inappropriate placement in a class for the mentally retarded.[92] But schools which breach a contract with a parent or which commit fraud in promoting a student may be held liable for such conduct.[93]

---

[88] Donohue v. Copiague Union Fee School District, 418 N.Y.S.2d 375 (Ct. App. 1975).

[89] Donohue at 376-77.

[90] Donohue at 377.

[91] Donohue at 377-78.

[92] Hoffman v. Board of Education of the City of New York, 424 N.Y.S.2d 376 (Ct. App. 1979); Helm v. Professional Children's School, 431 N.Y.S.2d 246 (1st Dept. 1980); Torres v. Little Flower Children's Service, 485 N.Y.S.2d 15 (Ct. App. 1984).

[93] Paladino v. Adelphi University, 454 N.Y.S.2d 868 (2nd Dept. 1982) (discussion of when a breach of contract or fraud action may be maintained); Village Community School v. Adler, 478 N.Y.S.2d 546 (Civ. Ct. N.Y. Co. 1984) (discussion of when action on fraudulent misrepresentation may lie).

CHAPTER V

MINORS AND MEDICAL TREATMENT*

In this section we discuss minors and the receipt of medical care without parental consent. After a general introduction, we cover the following topics:

- General Age of Consent

- Types of Minors

  —Minors Parents
  —Married Minors
  —Pregnant Minors
  —Emancipated Minors
  —Mature Minors
  —Runaways

- Types of Treatment

  —Emergency Care
  —Mental Health - In-Patient Treatment
  —Mental Health - Out-Patient Treatment
  —Abortion
  —Contraception
  —Sterilization
  —Sexually Transmitted Diseases
  —Alcohol Abuse
  —Drug Abuse
  —Blood Donations
  —HIV Related Testing and Treatment

Under "Types of Minors," we discuss medical care as it relates to the status of the minor. Under "Types of Treatment," we discuss medical care as it relates to particular health need of the minor, without regard to the status of the minor.

Introduction

The right of minors to consent to medical treatment is a source of continuing controversy and confusion. As we discuss below, treatment of minors on their own consent is permitted in a wide variety of situations. But first we need to review a few general principles before proceeding to our specific discussion.

In general, before a physician may treat a patient of any age, he or she must first obtain the consent of the patient. A physician who fails to do so commits a battery against the patient and could be held civilly liable for money damages. A battery is defined as the intentional offensive touching of another without consent. A physician who treats a patient without consent commits a battery because he has "touched" the patient without authority.

---

* Much of this section is based on *Consent and Confidentiality in the Health Care of Children and Adolescents: A Legal Guide*, by James M. Morrissey, Adele Hofmann, and Jeffrey C. Thrope (Free Press, 1986).

Historically, minors were considered legally incapable of consenting to any act, including the receipt of medical treatment. As a result, the physician who treated a minor based on the minor's consent alone was viewed as having committed a battery on the minor because a minor, by definition, was legally incapable of giving consent.

The general requirement of parental consent for the health care of minors derived from several important public purposes. First, minors as a group were assumed to lack the maturity to consent to medical treatment and thus need the informed counsel of a parent. Second, parents were assumed to exercise complete control and authority over their minor children, including controlling when their children should receive medical treatment. Last, because parents are financially responsible for their children, and their financial obligations could be increased if their children were harmed as a result of medical treatment, they were given the concomitant right to determine what medical procedures their children received.

We will see, however, that there are now, and always have been, many circumstances under which a minor can consent to treatment without parental consent. The general belief that physicians must obtain parental consent before treating minors is greatly exaggerated. In fact, we have been unable to locate a decision in the last *50* years where a physician was held liable for failure to obtain parental consent before treating a minor where the treatment was for the benefit of the minor and no malpractice was involved.[1] But old myths die hard and the purpose of this section is to debunk these myths, which have often resulted in minors being denied needed treatment.

One more point must be addressed briefly before we proceed to our specific discussion. We stated above that a physician must have the consent of the patient before he may provide treatment. This requirement has been expanded to require that the physician obtain the "informed" consent of the patient, whether an adult or a minor. In order for consent to be informed, the patient must understand: (1) his condition or problem, (2) the nature and purpose of the proposed treatment, (3) the risks and consequences of the proposed treatment, (4) the probability that the proposed treatment will be successful, and (5) feasible alternate treatment options, including no treatment at all.

If the patient cannot understand these factors, treatment may not proceed, even if the patient is an adult. Thus, it would be quite possible that minors as a group would be entitled to consent to a particular form of treatment (e.g., sexually transmitted diseases), but that an individual minor could not consent because he did not have the capacity to give informed consent. In the next section, we discuss when a minor can give informed consent to health care as a general matter. Whether an individual minor can give informed consent is an individual determination.

General Age of Consent

Any person who is 18 or older may consent to health services and the consent of no other person is required. *Public Health Law* § 2504(1). But the reader should note limitations set forth under "Sterilization."

Minor Parent

Any minor who is the parent of a child may consent to health care. *Public Health Law* § 2504(2).

Married Minors

Any minor who is or has been married may consent to health care. *Public Health Law* § 2504(1).

Pregnant Minors

Any minor who is pregnant may consent to medical services relating to prenatal care. *Public Health Law* § 2504(3).

---

[1] See, A. Holder. *Legal Issues in Pediatrics and Adolescent Medicine* (New York: John Wiley & Sons, 1977), p. 130. H. Pilpel, "Minors' Rights to Medical Care," 36 ALbany Law Review 466 (1972).

Emancipated Minors

Emancipated minors may consent to health care. Although there is not a specific statute on this point, we have not found a reported case where a physician has been held liable for treating an emancipated minor without parental consent. Indeed, in cases involving medical treatment of emancipated minors, the issue has been whether the parents can be required to pay for the treatment, not whether their consent was required. Most courts have held that parents cannot be required to pay for medical care rendered to a minor without the parents' consent. For the definition of emancipated minor. (See "Emancipation.")

Mature Minors

People often confuse the term "mature minor" with "emancipated minor." The most important distinction is that mature minors live at home with their parents and emancipated minors have established separate households. The mature minor doctrine would allow minors living at home to consent to treatment without parental consent if the following factors are present:

1) The minor is of a sufficient age of discretion (i.e., 15 or over);
2) The minor is able to give informed consent (i.e., sufficiently mature and intelligent to understand and appreciate the benefits and risks of the proposed treatment and to make a reasoned decision based on such knowledge);
3) The proposed treatment is for the benefit of the minor (i.e., not an organ donation);
4) The proposed treatment is deemed necessary (but it does not have to be an emergency); and
5) The treatment does not involve complex, high-risk medical procedures or complex, high-risk surgery.[2]

We have not found a reported decision in New York which specifically recognized the mature minor doctrine.[3] The principles discussed are based on rulings from other states. We note, however, that we have not located a single reported case where a physician was held liable for providing medical treatment to a mature minor without parental consent.

Runaways

We have not found a statute or case which specifically permits physicians to treat runaways without parental consent. It is very unlikely, however, that a physician would be held liable for providing needed treatment to a runaway. The physician should document in the file that the minor is a runaway, would not agree to parental notification and refused to give the necessary information for notification.[4] Physicians will most frequently encounter runaways when they are in need of emergency or necessary health services, in which case normal emergency rules apply. (See "Emergency.")

Emergency Care

"Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment, an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk of the person's life or health." *Public Health Law* § 2504(3).

The exception for emergency care is, perhaps, the oldest exception to the general requirement for parental consent for treatment of a minor, but it may be the least understood. Many physicians and emergency room personnel seem to believe that a minor must be in imminent danger of death before a minor may be given emergency care. This is simply not true and the term emergency should be construed broadly, not narrowly. A case example might make this point clearer.

---

[2] W. Wadlington, "Minors and Health Care: The Age of Consent," 11 Osgoode Hall Law Journal 119-20 (1972).

[3] Some have described Bach v. Long Island Jewish Hospital, 267 N.Y.S.2d 289 (Sup. Ct. Nassau Co. 1966), as a case supporting the mature minor doctrine, but because the minor in that case was married and living with her husband at the time that she consented to care, it may more properly be described as an emancipated minor case.

[4] A. Holder. *Legal Issues in Pediatrics and Adolescent Medicine* (New York: John Wiley & Sons, 1977), pp. 140-41.

George, age 20 (at a time when the age of majority was 21), was playing baseball. He slipped and fell while rounding one of the bases, injuring his ankle. George was taken to a local private physician who determined that the ankle was fractured, and required treatment. George consented to the treatment but the physician did not obtain parental consent. George's father sued the physician for failing to obtain parental consent before providing treatment. Could this be characterized as an emergency?

The court, in *Sullivan v. Montgomery*, ruled that it was. The court stated:

> if the physician or surgeon is confronted with an emergency which endangers the life or health of the patient, or that suffering or pain may be alleviated, it is his duty to do that which the occasion demands. I do not believe that those who have devoted their lives to humanity will wantonly . . . fail to obtain consent of parents where such consent may be reasonably obtained in view of the [emergency].[5]

In other words, the court will not second guess a physician's determination that an emergency existed unless that determination was not reasonable. It is not enough that another physician might have found otherwise, the determination must have been clearly wrong. We offer some guidelines below.

When a minor is very young and unable to give informed consent, the definition of emergency should be construed more narrowly. This is because it is preferable that someone consent to the treatment if possible.

Also, procedures which are irreversible, for example, an amputation or the removal of Fallopian tubes, should be performed without parental consent only when absolutely necessary and only if the parents cannot be located or some other compelling reason exists for not requiring parental consent.

Last, parents should be consulted when it is reasonable under the circumstances. This, however, should not be used as a basis to refuse treatment to a minor in need when the parents are not known or cannot be contacted.

Mental Health - In-Patient Treatment

Minors 16 and over may consent to voluntary admission to a mental health facility. *Mental Hygiene Law* § 9.13(a). Minors who have admitted themselves to a facility may also request their release. The minor must be released unless the facility determines that the minor should be involuntarily committed. Under such circumstances, the minor may be retained for a period not to exceed 72 hours during which time the facility must petition a court for involuntary commitment. The Court hearing must be scheduled within 72 hours of the date that the facility requests commitment. If the court determines that the minor is mentally ill and in need of care and treatment, the minor may be involuntarily retained. *Mental Hygiene Law* § 9.13(b).

Administering Antipsychotic Medication

The New York Court of Appeals has ruled that the mere fact that a person is an involuntarily hospitalized mental patient does not mean that the person lacks capacity to make treatment decisions. Rivers v. Katz, 67 N.Y.2d 485 (1986). The nonconsensual administration of antipsychotic medication to an adult is impermissible without prior court approval. Court approval may not be granted unless the person is incapable of making reasoned treatment decisions. The question arises, may minors, involuntarily hospitalized, refuse such medication?

---

[5] Sullivan v. Montgomery, 279 N.Y.S. 575, 577 (City Ct. Bronx Co. 1935).

At least one court has held preliminarily, that the requirement of a court order does not apply to minors. The court based its decision on *Public Health Law* § 2504 and Mental Hygiene Regulations.[6] We believe, however, that the better policy requires that a court order be obtained.

Mental Health-Out Patient

Mental health practitioners may treat minors on an outpatient basis without parental consent where the minor knowingly and voluntarily seeks such services, the services are clinically indicated, and the requirement of parental consent would have a detrimental effect on the course of the outpatient treatment. The statute states that the important role of the family should be recognized, and that the provider fully document reasons why treatment is provided without parental consent. *Mental Hygiene Law* § 33.21. Minors who are parents, emancipated or married may be treated without regard to the above requirement.

Abortion

New York does not have a statute which regulates when minors may receive abortions without parental consent. In the absence of a statute we must look to relevant United States Supreme Court decisions. In 1976, the Supreme Court ruled that a law which required parental consent before a minor could obtain an abortion was unconstitutional, and reaffirmed that ruling in 1983.[7] But advocates should be aware that the Supreme Court is reconsidering this whole issue and may, eventually, permit the individual state to impose restrictions on a minor's right to obtain an abortion.[8]

In New York, it is absolutely clear that minors mature enough to give informed consent to an abortion may obtain abortions without parental consent even if the minor lives with her parents. Nor is there any New York law which requires that a parent be notified that the abortion will take or has taken place. In the absence of such a law, which would have to comply with constitutional rules, notification against the patient's wishes is improper and might subject the physician to civil liability.

Contraception

Minors may obtain contraceptive care without parental consent, even if the minor lives at home with his or her parents. In 1977, the Supreme Court, in *Carey v. Population Services International*,[9] declared unconstitutional a New York law which prohibited the distribution of contraceptives to minors under 16 years of age. Also, there is no requirement that parents be notified when contraceptives are prescribed to a minor. In fact, such notification may be improper.

Moreover, both Title X of the Public Health Service Act, which provides funding for public and private entities for the provision of voluntary family planning services, and Title XX of the Social Security Act,[10] require that family planning services be made available to minors without regard to age, marital status, or parental consent.

Sterilization

New York does not have a specific statute regarding a minor's competence to consent to sterilization. Because of the irreversible nature of sterilization, minors should not be viewed as legally competent to consent to sterilization. Indeed, local regulations may require that a person must be 21 to consent to a sterilization. Also, federal reimbursement is not available under any circumstances for sterilization procedures performed on a person unless he or she is at least 21.[11]

---

[6] Mental Hygiene Legal Services v. Sarles, NYLJ, 12/28/88, P. 25, Col 5, (Suf. Co. Sup. Ct.).

[7] Planned Parenthood of Missouri v. Danforth; 428 U.S. 52 (1976); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

[8] Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

[9] 431 U.S. 678 (1977).

[10] 42 U.S.C. § 602(a)(15).

[11] 42 C.F.R. § 441.253.

Sexually Transmitted Diseases

"A licensed physician, or in a hospital, a staff physician, may diagnose, treat or prescribe for a person under the age of twenty-one years without the consent or knowledge of parents or guardian of said person where such person is infected with a sexually transmitted diseases, or has been exposed to infection with sexually transmitted diseases." *Public Health Law* § 2305(2). There is not notification requirement.

Alcohol Abuse

Mental Hygiene Law § 21.11 provides that in treating a minor for alcohol abuse, the important role of the parent shall be recognized and steps shall be taken to involve the parents in treatment and obtain their consent for the treatment. However, if parental involvement and consent would have a detrimental effect on treatment, or the parent refuses to consent to the treatment and the physician believes treatment is necessary in the best interests of the minor, consent of the parent is not required. The physician must document the reasons why parental consent was not sought or obtained.

Drug Abuse

New York does not have a specific statute which permits minors to consent to treatment for drug problems. We refer the reader to "Mental Health Treatment — Out-Patient" above.

Blood Donation

"Any person of the age of seventeen years or over shall be eligible to donate blood in any voluntary and noncompensatory blood program without the necessity of obtaining permission or authorization." *Public Health Law* § 3123.

HIV Related Testing and Treatment

Minors may consent to HIV related testing as long as they are able to give informed consent. *Public Health Law* §§ 2780 (7), 2781. If the minor tests positive, then that information must be held strictly confidential unless disclosure is specifically authorized by statute. (See *Public Health Law* § 2782.)

While the Public Health Law does not specifically permit the minor to consent to health care which may be recommended as the result of a positive HIV test result, it is likely that the minor may consent to such treatment. First, because the minor was deemed capable of giving informed consent to the testing, the minor is probably capable of giving informed consent to treatment. Second, the minor may be able to give consent because the treatment may fall under one of the other exeptions discussed in this section. Third, the public policy favoring the prompt treatment of HIV positive minors is very strong.

CHAPTER VI

MINORS, THE COURTS AND THE POLICE

Introduction

Minors, because of their age, are more subject to regulation by the courts and police than any other age group. Thus, it is quite important to understand the law regarding minors, the police, and the courts. In this section, we discuss:

- Violations, Misdemeanors and Felonies
- Right to an Attorney
- Capacity to Commit Crimes
- Drug Laws
- Minors and the Police
- Persons In Need of Supervision
- Juvenile Delinquents
- Designated Felonies
- Juvenile Offenders
- Youthful Offenders
- Statutory Rape and Other Sex Offenses
- Criminal Offenses Relating to Children
- Minors as Witnesses in Criminal Proceedings
- The Human Service Provider and The Criminal Process

The reader should note that we have covered child maltreatment proceedings, family offense proceedings, and other forms of harassment not covered by family offense proceedings in the section entitled "Minors and the Family."

Categories of Criminal Offenses

There are three different categories of criminal offenses: (a) felonies, (b) misdemeanors and (c) violations. Each category is defined below.

Felonies

A felony is defined as "an offense for which a sentence to a term of imprisonment in excess of one year may be imposed." *Penal Law* § 10.00(5). Felonies are the most serious offenses of the three categories. Felonies are further divided into five classes, A through E, with a class A felony being the most serious. A young person convicted of a felony in the adult court will have a criminal record unless he or she is adjudicated a "youthful offender." (See "Youthful Offenders.")

Misdemeanors

A misdemeanor is "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed." *Penal Law* § 10.00(4). Misdemeanors are further divided into class A, class B, and unclassified. A young person convicted of a misdemeanor in adult court will have a criminal record unless he or she is a "youthful offender." (See "Youthful Offender.")

Violations

A violation is "an offense, other than a 'traffic infraction' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed." *Penal Law* § 10.00(3). A violation is the least serious of the categories of criminal offenses, and the conviction of a violation will not result in a criminal record.

Right to an Attorney

Minors who are brought before the family court as "persons in need of supervision" or as "juvenile delinquents" have the right to have an attorney appointed by the court for his or her defense if unable to afford private counsel. *Family Court Act* § 262. Also, minors who are subject to a criminal prosecution in adult court for a misdemeanor or a felony have the right to have an attorney appointed for their defense if financially unable to retain private counsel. *Criminal Procedure Law* §§ 180.10, 210.15.

Capacity to Commit Crimes

As a general matter, minors less than 16 are not criminally responsible for their conduct. By this we mean that they would be processed in the family court rather than in the adult criminal court. But minors as young as 13 who are charged with certain serious criminal offenses may be held responsible for their conduct and can be tried in the adult criminal court (see "Juvenile Offenders").

Drug Laws

In 1977, New York decriminalized possession of small amounts of marijuana. Possession of less than 7/8's of an ounce is a violation and a conviction of this offense will not result in a criminal record. *Penal Law* § 221.05. However, possession of marijuana, no matter how small the amount, in a public place, or open to public view is still a crime and smoking marijuana in a public place, or open to public view are crimes. *Penal Law* § 221.10.

The sale of marijuana, no matter how small the amount, is also a crime. Even the act of giving someone a joint without any exchange of money is a crime. *Penal Law* §§ 221.35-221.55. Young people must be advised that for the most part, the possession and/or consumption of marijuana could result in the conviction of a criminal offense.

Not surprisingly, the possession and/or sale of any other controlled substance, narcotic, hallucinogen, stimulant or depressant is illegal and could result in a criminal conviction.

Last, the presence of illegal drugs in a car creates the presumption that *all* persons in the car possessed it, unless it is concealed on one of the persons riding in the car. The presence of illegal drugs in a room under circumstances evincing an intent to sell them also creates the presumption that *all* persons present in the room possessed it. *Penal Law* § 220.25. In both these situations, the minor would have to come forward with the evidence that she or he did not know of its presence in order to avoid conviction. Thus, minors should be cautioned if their friends traffic in drugs.

Minors and the Police

As a general matter, the police may not stop and question a person unless they have some reasonable suspicion that the person is or was involved in some sort of criminal behavior. This rule is applicable to minors as well. However, because the areas of proscribed conduct for minors are much greater than for adults, the police have broader authority to stop and question minors, especially minors who are not in school during school hours. This can be seen most clearly in a case decided by the Appellate Division entitled *Matter of Terrance*.

In *Terrance*, the minor, a fifteen-year-old, was standing on the mezzanine level of the Port Authority Bus Terminal in New York City at 12:30 P.M. on a school day. Two policemen asked Terrance his name and age, which he provided. Terrance also informed the police that he had just gotten off a bus from South Carolina, and that he was staying "nowhere." Terrance was taken to the police room in Port Authority and "patted down" by the police. They discovered a .22 caliber revolver. Juvenile delinquency charges were subsequently brought against Terrance and the issue presented to the court was whether the police search was legal. The court upheld the search as legal, basing its decision on Section 718 of the Family Court Act, which gives the police the power to take into custody any minor under age 16 who, in the reasonable belief of the police, has run away from home without just cause. The court ruled that the minor's presence in an area known to be a national gathering place for runaways, his admission that he was only fifteen and that he had come to New York from a distant state, and his inability or refusal to provide the police with a local address not only satisfied the criteria of Section 718 as to what constitutes a 'reasonable opinion' that a child is a runaway, but indeed makes any other conclusion as to the boy's status highly speculative, to say the least.[1] An adult could not have been searched under similar circumstances.

This provision of the Family Court Act would seem to vest in the police very broad latitude in stopping and questioning minors. For example, it is probably permissible for a police officer to stop and question a young person who appears to be of compulsory school attendance age if the young person is encountered outside of school during school hours. Again, the police would not have similar authority over an adult. The criteria of what constitutes a reasonable belief that a minor has run away cannot be set forth conclusively and would have to be considered based on the facts of each individual case. This rather expansive authority of the police is based on the theory that it in fact is for the protection, and not the harassment, of minors. Again, to quote the Appellate Court:

> That children cannot be considered, in law, fully independent and autonomous beings flows necessarily not only from the fact of their physical immaturity but also because, by the sheer, immutable fact of youth, they are lacking both in intellectual development and in the formation of moral character. Children, thus, need instruction. They need protection. And no child is more . . . in need of protection than the child runaway.[2]

Indeed, the Court of Appeals ruled in *Matter of Shannon*, that the police have the power to hold minors for the purpose of returning them to school, even if the minor is not a runaway.[3] In this case, the police observed a minor at 10:15 a.m. standing one-half block from the local school. The minor was questioned as to why she was not in school and, according to the police, could not give a satisfactory answer. The minor was asked to step into the police van, which she did, but shortly thereafter had to be physically restrained from leaving. As a result, the minor was handcuffed and arrested and charged as a juvenile delinquent. The question before the Court was whether the minor could be arrested for truancy without explicit statutory authorization. The Court of Appeals ruled that the police had such authority. Such decisions view the actions of the police as fundamentally protective and in the best interest of minors.

It is important to note, however, that the perceived needs of children, and their perceived lack of formation of moral character, are applied unevenly at best. In New York State, a child as young as 13 charged with a serious crime can be treated as an adult by the criminal courts. Thus, for punitive purposes, society is more willing to assume that the minor has sufficient intellectual and moral development to be held responsible for his or her acts.

We recommend that minors be counselled that if they are stopped by the police, they should treat the police with as much courtesy as possible, even if they feel that they are being treated unfairly. In this way, the chances of resolving the situation in a positive way are increased. Minors who act in a hostile manner may have charges filed against them based on the interaction with the police, even if the police could not lawfully have arrested the minor in the first place.

---

[1] Matter of Terrance G., 492 N.Y.S.2d 365 (1st Dept. 1985).

[2] Matter of Terrance G. at 368.

[3] Matter of Shannon R., 522 N.Y.S.2d 488 (Ct. App. 1987).

For example, assume that a 17-year-old is stopped by the police and asked why he is not in school. The 17-year-old explains to the police that he has dropped out of school, as he is legally permitted to do. Thus, there would be no basis for any legal action against the minor. But if the minor uses abusive language and resists the police effort, he may find himself facing criminal charges of harassment and disorderly conduct.

However, courtesy does not encompass answering questions without legal advice. Such uncounselled conversations may work to the minor's detriment. Anytime a minor is suspected of criminal activity and questioned by the police, the minor should give his or her name, age and address and nothing more until he or she consults with a lawyer. This will assure that the minor's constitutional rights and personal interests are protected.

Persons in Need of Supervision*

Introduction

PINS proceedings are, perhaps, the classic example of young people being subject to laws solely because of their status as young people and not because they have engaged in criminal behavior. A PINS offense is commonly referred to as a "status" offense for which a young person could be brought before the family court, even though persons over the PINS age who engage in the very same conduct would not be subject to family court intervention. It is their status of being below the age of 16 which subjects them to court jurisdiction. Young people who are alleged or found to be a PINS have not been found or alleged to have engaged in behavior which constitutes a crime.

A PINS is a person under 16 years of age who does not attend school although required to do so, or who "is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his parents," or is guilty of unlawful possession of marijuana. *Family Court Act* § 712 (a). The statute states that young women up to age 18, but young men only up to age 16 can be found to be PINS. This provision was declared unconstitutional by the New York Court of Appeals in *In Matter of Patricia A.*[4]

The effect of the court's ruling was to lower the PINS age for females to 16. Thus, if the acts complained of occurred after the young person turned 16, then the PINS law would not apply. Also, a person 18 and over cannot be found to be a PINS for behavior which occurred before the young person's 16th birthday.

Examples of behavior for which a young person could be alleged a PINS include:

1) Refusal to attend school,
2) Running away,
3) Coming home late at night against a parent's instructions,
4) Use of drugs or alcohol,
5) Refusing to obey a parents reasonable rules and regulations.

PINS petitions are usually filed by parents, however, schools may file PINS petitions for truancy. A child cannot be found to be a PINS based on a single act of misbehavior, but only for a series of misbehaviors. Also, if the child's misbehavior is the result of parental actions, a neglect/abuse petition against the parent can be substituted for the PINS petition.

Court Procedure

PINS proceedings are conducted in the family court. The family court usually will try to settle the matter without formal court intervention. This is done by the Probation Department and could include, for example, a referral to an outside agency for counselling, and the informal supervision of the child for up to two months. (Note: Use of community-base services may become mandatory as a result of recent changes in the Family Court Act.) If, however, the matter cannot be resolved informally, a PINS petition against the child may be filed.

---

* The Family Court Act encourages diversion of PINS cases out of the family court and to community-based services. The reader is cautioned that the requirements which must be met before a PINS petition may be filed may change as a result. The basis for a PINS petition, and the other procedures described in this section, remain the same.

[4] In Matter of Patricia A. 335 N.Y.S.2d 33 (Ct. App. 1972).

The petition will contain allegations of misbehavior against the young person and a date on which the young person is required to appear at the family court. When the young person appears, he will be assigned an attorney to represent his interests, as distinct from the interests of his parents. The young person can be placed outside of the home (remanded) only if there is a substantial probability that he will not appear on his court date or if there is a serious risk that they young person will do an act which, if committed by an adult (i.e., person 16 or over) would constitute a crime. If, however, the parent will not allow the young person to return home, a judge might remand him, although this basis alone is not proper. In any event, a person alleged to be a PINS may not be placed in secure detention.

A PINS proceeding has two parts - a fact-finding hearing and a dispositional hearing. The fact-finding hearing is a trial, but without a jury. Witnesses will be called to testify about the young person's misbehavior. These witnesses may be crossed examined by the young person's attorney. The young person may testify, although this is not required, and may call witnesses in his or her defense. It must be established beyond a reasonable doubt that the young person engaged in the misbehavior alleged in the petition, or the petition must be dismissed.

Assuming the allegations are proved beyond a reasonable doubt, the court will conduct a dispositional hearing to consider whether the young person will be found to be a PINS. After the dispositional hearing, the court could do one of the following:

1) The action could be dismissed if the young person does not require supervision or treatment, or
2) A discharge with a warning, or
3) A suspended judgment for up to a year subject to the terms and condition of the court, or
4) Probation for up to one year, or
5) Placement with the Division of Youth for placement in a Title II (nonsecure) facility or with a private agency or with the Commissioner of Social Services.

Suspended judgments and probation may be extended only where the family court finds "exceptional circumstances" for the extension. Placement may be extended for up to a year. Finally, for young people over 10 years of age, the Court may order restitution for property damage and/or loss up to $1,000.00.

Summary

There is a substantial debate whether young people should be brought before a family court for behavior which is not criminal, and usually is the result of intra-family problems. However, attempts to repeal the PINS law have been unsuccessful. Recent amendments to the Family Court Act, however, which strongly encourage the use of community-based services before a PINS petition may be filed, seem to reflect a compromise, or at least a recognition that these problems may be resolved better outside of the court. In any event, young people subject to PINS proceedings should take the matter very seriously.

Juvenile Delinquency

A juvenile delinquent is defined in Section 301.2(1) of the Family Court Act as a person over seven and less than sixteen years of age who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court.

In order for a young person to be adjudged a juvenile delinquent, he must be charged with acts which would be crime (i.e., a misdemeanor or felony), if done by an adult, and he must fall within the age category. Young people, 16 or older, will be brought before the adult criminal court, not the family court. The age of the young person at the time the act was committed determines in which court the matter will proceed. *Family Court* § 302.1(2). If a young person commits a crime (other than a designated felony - see next section) one week before turning 16, the matter will be referred to the family court, even though the young person will be 16 at the time of the court proceedings.

Young people charged with certain serious crimes, however, may be brought before the adult court when they are as young as 13. The crimes are called "juvenile offenses" and are discussed in the next section. Section (b) of the definition of a juvenile delinquent refers to cases where the young person has committed a designated felony, but the criminal court has decided that the young person should not be tried as an adult and transferred the matter to the family court. The distinction is important primarily because young people found to be juvenile delinquents by the family court do *not* have criminal records as a result. Young people convicted of a juvenile offense in the criminal court do have criminal records unless found to be a youthful offender (see "Youthful Offender"). Also, the term of incarceration may be longer.

The distinction between a Person In Need of Supervision and a Juvenile Delinquent (JD) is simple. A PINS has not been found to have committed acts which, if done by an adult, would constitute a crime, but the JD has.

How the Process Begins

A young person alleged to be a JD generally will be taken into custody by the police or issued a summons or a warrant. The young person may be released to his parents with a date to appear in family court or taken immediately to the family court if the court is open, or taken to a remand facility designated for juvenile delinquents if the court is closed.

Initially, the family court, through the probation department, will make an effort to settle the matter between the young person and the complainant.[5] If the case is settled, the young person will not appear before a judge, and will not be subject to the family court process. If the matter cannot be settled, a petition is filed against the young person and the formal family court process will begin.

It is unlikely that the court hearing will take place on the same date that the petition is filed. The questions then arise, will the young person be allowed to go home pending the fact finding hearing or be held in a detention facility? A young person can be detained only if at least one of the following applies:

a) there is a substantial probability that he will not appear in court on the court date; or

b) there is a serious risk that he may commit a crime before the next court appearance.

Family Court Act § 320.5.

If the young person is detained, the Family Court Act contains time limitations within which the court proceeding must occur.

Court Process

A JD proceeding is divided into two parts - a fact-finding hearing and a dispositional hearing.

The fact finding hearing is virtually identical to a trial in criminal court, but the young person is not entitled to a trial by jury. A judge presides over the proceeding, there is a prosecuting attorney and the young person is represented by an attorney. If the young person cannot afford an attorney, one will be appointed by the court.

---

[5] The probation department may not settle designated felony cases without Court approval. Family Court Act § 308.1(3).

The prosecuting attorney first presents the case against the young person. Witnesses will be called by the prosecution and cross-examined by the young person's attorney. The young person may then present his own case, including calling witnesses to testify on his behalf. The young person cannot be required to testify.

The prosecution must prove, beyond a reasonable doubt, that the young person actually committed the acts charged in the JD petition. The judge determines if the prosecution has met this burden.

Assuming that the young person is found to have committed the acts alleged in the JD petition, the court will conduct a dispositional hearing to determine what type of intervention, if any, is appropriate. (Note that this is rarely done immediately at the conclusion of the fact-finding hearing). This phase is quite important because the purpose of the depositional hearing is not to punish, but rather to provide the young person with appropriate services and to provide protection to the community-at-large. Thus, the human service provider who has knowledge of the character and needs of the young person can play a very important role in aiding the court in its decision.

The possible dispositions include the following:

a) *Conditional discharge* - The case can be conditionally discharged for up to one year and the matter will be dismissed if, during that time, the young person abides by the terms and conditions set by the judge. The terms and conditions could include, for example, attendance at school, counselling, drug rehabilitation, etc.

b) *Probation* - The young person can be put on probation for up to two years, and this can be extended for up to one year based on "exceptional circumstances."

c) *Placement* - The young person may be placed with the Division for Youth for placement in a Division for Youth facility or with an authorized private agency, or the Commissioner of Social Services, or with a suitable relative or other suitable person. The placement may be for up to 18 months if the young person has committed a felony and for up to 12 months if the young person has committed a misdemeanor. The Court is permitted to extend placement for an additional year where petitioned to do so by an appropriate party.

d) *Restrictive Placement* - JD's who have committed one of the designated felonies may be placed in a DFY secure facility. The length of the placement depends on the underlying crime.

e) *Mental Health Placement* - JD's who are found to suffer from a mental illness, mental retardation or developmental disabilities as defined by the mental hygiene law, which is likely to result in serious harm to self or others may be placed in a mental health facility through the Division for Youth.

f) *Restitution* - As a condition of any of the above, restitution for up to $1,000 to replace or repair property if the respondent is over 10 years of age.

Summary

A finding that a young person is a JD does not result in the conviction of a crime. JD proceedings, however, must be taken very seriously because they can result in lengthy placements or commitments in secure facilities, depending on the underlying crime.

Designated Felonies

In the Family Court, there are special rules for proceedings in which young people are alleged to have committed certain serious felonies. The felonies are listed in the Family Court Act and are referred to as "designated felonies." Young people accused of committing designated felonies are referred to as "designated offenders."

The "designated felonies" are defined in part by the age of the offender. For persons *13, 14 and 15 years old*, the designated felonies include:

- murder in the first degree;
- murder in the second degree;
- kidnapping in the first degree;
- arson in the first degree;
- assault in the first degree;
- manslaughter in the first degree;
- rape in the first degree;
- sodomy in the first degree;
- aggravated sexual abuse;
- kidnapping in the second degree but only where the abduction involved the use or threat of use of deadly physical force;
- arson in the second degree;
- robbery in the first degree;
- attempt to commit murder in the first or second degree

or;

- attempted kidnapping in the first degree.

Family Court Act § 301.2(8).

For persons *14 and 15 years old*, the following also are "designated felonies" also include:

-burglary in the first or second degree;
-assault in the second degree or robbery in the second degree where there has been a prior finding by a court that the young person has previously committed an act which, if committed by an adult, would be the crime of assault in the second degree, robbery in the second degree or any designated felony listed above, regardless of the age of such person at the time of the commission of the prior act.

Family Court Act § 301.2(8).

Finally, acts other than misdemeanors committed by persons between 7 and 16 are designated felonies where there have been two prior findings by the court that such person has committed a prior felony. *Family Court Act* § 301.2(2).

The procedural rules in designated felony cases in Family Court will not be discussed in detail in this Manual. However, it is important to note that the consequences in designated felony cases are more serious than in other juvenile delinquency cases, since the Family Court Act limits the possibility of resolving such cases in consultation with the probation department (*Family Court Act* § 320.6(2)), and permits longer confinement in secure facilities for designated offenders. As in any juvenile delinquency proceeding, the young person should be represented by an attorney, and if not possessed of sufficient resources to afford one, an attorney will be provided by the court.

Juvenile Offenders

Young people as young as 13 charged with serious criminal offenses may be treated as adults rather than children by the courts. As a result, the young person may be brought before the adult criminal court, rather than the family court, and be subject to the same penalties on conviction as would an adult. These young people are referred as "juvenile offenders." A conviction would result in a criminal record unless the young person is found to be eligible for "youthful offender" status (discussed below).

The general rule is that persons less than 16 years old are not criminally responsible for conduct, and their cases are handled in the Family Court, rather than the adult Criminal Court. However, persons *13, 14 and 15 years old* may be held criminally responsible and brought before the adult

Criminal Court if charged with murder in the second degree. *Penal Law* § 30.00(2). (However, they may only be found guilty of second degree murder based on their involvement in commission of a felony during which someone was killed only if the underlying crime is one for which the young person is criminally responsible.)

In addition, a person *14 or 15 years old* may be held criminally responsible and brought before the adult Criminal Court for acts constituting:

- kidnapping in the first degree;
- arson in the first degree;
- assault in the first degree;
- manslaughter in the first degree;
- rape in the first degree;
- sodomy in the first degree;
- aggravated sexual abuse;
- burglary in the first or second degree;
- arson in the second degree;
- robbery in the first or second degree; or
- attempt to commit murder in the second degree or kidnapping in the first degree.

Penal Law § 30.00(2).

Juvenile offenders will initially be brought before the adult Criminal Court. The young person may, however ask that the matter be handled by the Family Court. Criminal Procedure Law § 210.43. This is referred to as a request for "removal" to the family court. The court, in making its determination whether the matter should be removed to the family court, will consider the following factors:

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the young person;
(e) the purpose and effect of imposing upon the young person a sentence authorized for the offense;
(f) the impact of a removal of the case to the family court on the safety or welfare of the community;
(g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system;
(h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
(i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.

Criminal Procedure Law § 210.43.

In addition, the court may order a case involving a juvenile offender removed to the family court upon the request of the prosecuting attorney if it is determined to be in the interests of justice based on the factors listed above. However, the court must make additional mitigating findings before it may remove to Family Court a young person who is charged with any of the following:

- murder in the second degree;
- rape or sodomy in the first degree; or
- certain armed felonies.

Criminal Procedure Law § 180.75.

Finally, even if a juvenile offender is convicted in the adult court, the court may, under proper circumstances, substitute a finding of "youthful offender" for the conviction and thus, a criminal record of the conviction would not result. (See "Youthful Offender.")

Youthful Offender

The conviction of a crime results in a criminal record and is a very serious matter.* It could result in a term of imprisonment and/or fine. It could also result in a person being disqualified from holding public office, certain public and private jobs, or receiving licenses necessary for employment, although New York does have a law protecting ex-offenders from being unfairly denied jobs based on their convictions. *Correction Law* § 750-755. In addition, ex-offenders may suffer from the social stigma attached to persons convicted of a crime.

Earlier, we explained that young people under 16, charged with acts which, if done by an adult, would constitute a crime are generally handled by the family court. (Note, however, that certain juveniles charged with very serious crimes, referred to as juvenile offenders, may be brought before an adult court). We further stated that a finding of "guilt" in the family court does not result in a criminal record.

New York also has a special procedure, called the Youthful Offender Procedure, by which young people under 19 who are subject to adult criminal court procedures can be relieved of the burden of a criminal conviction under appropriate circumstances. *Criminal Procedure Law* § 720 et seq. The Youthful Offender Procedure grew out of the realization that older adolescents, although treated as adults for purposes of criminal court jurisdiction, present special needs because they may not have developed the controls and restraints traditionally associated with adulthood and should, as a result, be entitled to some special consideration. Thus, juvenile offenders, and other young people ages 16, 17, and 18, convicted of a crime, may have their convictions eliminated from their records, and a finding of youthful offender substituted for the convictions. A young person found to be a youthful offender does *not* have a criminal record as a result.

Not all young people convicted of a crime will qualify for youthful offender status. *Criminal Procedure Law* § 720.10. Specifically, young people convicted of certain violent felonies, or who were previously convicted of a felony (even if youthful offender status was substituted for the conviction) or found to be a juvenile delinquent after having committed a designated felony will not qualify. Also, young people convicted of armed felonies probably will not qualify, although the judge may substitute a finding of youthful offender under special circumstances. It is important that the possibility of youthful offender status be explored in each case, and young people should be alerted to this procedure.

It is not easy to tell, on the basis of an interview, if a young person convicted of the crime was found to be a youthful offender. With the exception of certain privacy rights, the court procedures for young people and other adults are virtually identical. Also, a young person could be sentenced to jail and/or probation and still be found to be a youthful offender. In our experience, young people who have gone through the criminal court process often are confused about the procedure and simply may not know whether they were found to be a youthful offender. Because the benefits of youthful offender status are so important, this is a crucial piece of information. We recommend that the young person (or a counselor with the young person's permission) contact the attorney who represented the young person in the case to find out if youthful offender status was granted and, if so, the legal consequences of that status.

---

* One must be convicted of a misdemeanor or a felony to be convicted of a crime. A misdemeanor is an offense, other than a traffic infraction, for which a person may be imprisoned for at least 15 days and up to one year. A felony is an offense for which a person may be imprisoned for over one year. *Penal Law* § 10.

Statutory Rape and Other Sex Offenses

Statutory rape, which is a felony, is the name commonly given to the crime of an adult having sexual relations with a minor to whom the adult is not married. This may be considered rape, not because force is involved, but because the minor is presumed too immature to consent to sexual intercourse. In New York State, minors under the age of 17 are conclusively presumed incapable of consenting to sexual relations. *Penal Law* § 130.05(3)(a). The young minor is considered the victim rather than the perpurtrator of the crime.

There are three degrees of statutory rape:

1) A person 21 or older engages in sexual intercourse with a person less than 17 years of age. *Penal Law* § 130.25 (3rd degree).
2) A person 18 or older engages in sexual intercourse with a person less than 14 years of age. *Penal Law* § 130.30 (2nd degree).
3) A male engages in sexual intercourse with a female less than 11 years of age. *Penal Law* § 130.35 (1st degree).

There are no exceptions to these laws, unless the people are married. It does not matter how physically or emotionally mature the minor is or that the minor is emancipated.[6]

Homosexual Relationships

Homosexual relations between a minor and an adult may violate the criminal sodomy statute, which outlaws certain acts of "deviate sexual intercourse." This term is defined as "sexual contact between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. *Penal Law* § 130.00.

A person is guilty of sodomy in the third degree when he or she is 21 years or more and engages in deviate sexual intercourse with a person less than 17 years of age. *Penal Law* § 130.40.

A person is guilty of sodomy in the second degree when, being 18 or older, he [or she] engages in deviate sexual intercourse with another person less than 14 years old. *Penal Law* § 130.45.

A person is guilty of sodomy in the first degree when he [or she] engages in deviate sexual intercourse with another person who is less than 11 years old. *Penal Law* § 130.50.

Sexual Miscondut and Abuse

Where the age differentials discussed above do not apply, a person who has sexual relations with a person less than 17 may be guilty of sexual misconduct, *Penal Law* § 130.20, or sexual abuse, *Penal Law* § 130.55. The crime of sexual abuse, however, does not occur if the sexual contact is consensual, the minor is more than 14, and there is less than a five year age difference with the other person.

Corrupting the Morals of a Minor

There is no such crime as "corrupting the morals of a minor," but rather there is a crime called "endangering the welfare of a child." This occurs when an adult acts in a manner harmful to the physical, mental or moral welfare of a child less than 17. *Penal Law* § 260.10. The age distinction between young men and young women has been upheld by a lower court as constitutional.[7]

Criminal Offenses Relating to Children

In earlier sections of this manual we described circumstances where the failure of a parent to care adequately for a child is considered a criminal offense. The Penal Law also sets forth a number of crimes which people unrelated to children may commit designed solely to "protect" children. Because these statutes speak for themselves, we quote them extensively.

---

[6] See People v. Dozier, 52 N.Y.2d 781 (1980).

[7] People v. Prainito, 410 N.Y.S.2d 772 (Sup. Ct. Bronx Co. 1978).

Endangering the Welfare of a Minor

A person is guilty of endangering the welfare of a minor when "he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health." *Penal Law* § 260.10.

Unlawfully Dealing with a Child

"A person is guilty of unlawfully dealing with a child when:

1. Being an owner, lessee, manager or employee of a public dance hall, public pool or billiard room, public bowling alley, theater, motion picture theater, skating rink,[8] or for a place where alcoholic beverages are sold or given away, he permits a child less than sixteen years old to enter or remain in such places unless:

(a) The child is accompanied by his parent, guardian or an adult authorized by a parent or guardian; or
(b) The entertainment or activity is being conducted for the benefit or under the auspices of a non-profit school, church or other educational or religious institution; or
(c) Otherwise permitted by law to do so; or
(d) The establishment is closed to the public for a specified period of time to conduct an activity or entertainment, and no alcoholic beverages are sold, served, given away or consumed at such establishment during such period...

2. He knowingly permits a child less than eighteen years old to enter or remain in a place where illicit sexual activity or illegal narcotics activity is maintained or conducted; or

3. He marks the body of a child less than eighteen years old with indelible ink or pigments by means of tattooing; or

4. He gives or sells or causes to be given or sold any alcoholic beverages ... to a person less than twenty-one years old; except that this subdivision does not apply to the parent or guardian of such person ...; or

5. He sells or causes to be sold tobacco in any form to a child less than eighteen years old." *Penal Law* § 260.20.

Sexual Performance By a Child

The Penal Law also prohibits the use of children less than sixteen in a "sexual performance" and promoting " the obscene sexual performance" by a child less than sixteen. *Penal Law* § 263.05 and 263.10.

A sexual performance includes "actual or simulated sexual intercourse, deviate sexual intercourse, sexual beastiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

A performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the purient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual beastiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. *Penal Law* § 235.00.

---

[8] Governor Cuomo, recently signed a bill which liberalizes when minors may skate in ice or roller rinks.

Minors as Witness in Criminal Proceeding

Introduction

Before a witness is allowed to testify in a criminal proceeding he or she must take an oath to "tell the whole truth and nothing but the truth." This is done to impress upon the witness the seriousness of the proceeding, which could result in the accused being sent to jail, fined, or put on probation. Special problems may arise regarding a minor's ability to understand the oath.

Minors over 12

If a minor is over 12 years of age, the court will assume that the minor has the capacity to understand the oath and the obligation to tell the truth. A person wishing to challenge the minor's capacity to testify would have to show that, because of a mental disease or defect, the minor cannot understand the oath. *Criminal Procedure Law* § 60.20.

Minors Under 12

If the witness is under 12 years of age, he or she may not testify under oath unless the court is satisfied that the child has sufficient capacity and intelligence to understand the oath. A judge would look to the ability of the child to understand the seriousness of the proceedings and of the absolute need to tell the truth. *Criminal Procedure Law* § 60.20.

Minors Unable to Understand the Oath

The fact that a minor is unable to understand the oath will not automatically prevent the child from testifying. The court may accept "unsworn testimony" if the court, in its discretion, feels that the witness has sufficient intelligence and capacity to justify receiving the testimony into evidence. *Criminal Procedure Law* § 60.20.

New rules have recently been adopted concerning the testimony of young children in child maltreatment cases. These rules will not be discussed here, but it is important to note that, in determining whether to report suspected cases of child abuse or neglect, one should not be concerned with whether or not the information provided to you by a young child will be admissible in court. The legal requirements to report child abuse/neglect are not effected at all by the capacity of the child to testify in court.

Human Service Providers and the Criminal Process

What can the human service providers do for a young person who is caught up in the criminal law process? We offer several suggestions below.

Criminal Suspects and Cooperation with the Police

Should young people suspected of criminal activity "cooperate" with the police? By cooperate we mean talk to the police or other law enforcement officials without the assistance of counsel. Oftentimes young people suspected of criminal activity are advised by the police to "come down to the station, give us your side of the story, and we can clear this matter up." It is a tempting proposition and sounds reasonable, especially if the young person insists on his innocence. We, however, counsel against suspects talking to the police without the benefit of counsel. While young people in this situation may think that they are demonstrating their innocence they may, in fact, incriminate themselves.

An example might make this point clearer. Your client is walking down the street. In front of him, a young man with similar physical characteristics grabs a woman's purse and runs away. Later that afternoon, the police advise your client that he is suspected of the purse snatching. Your client wants to tell the police that, although he was in the vicinity when the purse was stolen, he did not steal the purse. While this seems quite reasonable, the client will be putting himself at the scene of the crime and, if he is later arrested for the crime, regardless of his "cooperation," the prosecution has an admission that he was at the "scene of the crime." Thus, there is one less matter that the prosecution will have to prove to find your client guilty of the crime.

We do not mean to say that this is an easy matter - it isn't. Failure to "cooperate" could result in your client being arrested. But even if arrested, your client will have the benefit of having an attorney present during questioning thus minimizing the chance that he will make an admission against his interests.

Sentencing or Dispositions

Perhaps the place where the human service provider can have the greatest beneficial impact is when the young person has been convicted of a crime and is about to be sentenced, or when the family court is about to render a disposition after a fact-finding proceeding pursuant to a JD or PINS proceeding. For purposes of this discussion, all three will be treated together.

A finding of guilt or that a young person has engaged in "PINS" or "JD" behavior is only the first stage in the court process. The court must then decide what will happen to the young person. As part of that process, the court will order that a report be prepared on the young person to help it make a determination. The report will consider such matters as the history of the young person including previous conduct, the family situation, the psychological state of the young person, school adjustment and employment, just to name a few. The human service provider can be an invaluable resource in assuring that the report is complete and accurate and that it contains mitigating factors which might help to explain the young person's conduct.

The report will also make recommendations to the judge regarding the sentence or disposition. Here, the human service provider can have a beneficial impact by offering alternatives to incarceration or placement. This could include, for example, use of the human service provider's own program, or another program in community. Here is the opportunity to be creative and influential in affecting positively the life of the young person. Most judges will listen closely to the opinion and suggestions of human service providers who have had an on-going working relationship with the young person.

CHAPTER VII

MISCELLANEOUS MATTERS

In this chapter we address miscellaneous matters which do not fit neatly in any of the other chapters. Included are the following:

- Alcoholic Beverages;
- Contracts and Necessaries;
- Name Change - Statutory Method;
- Right to Vote;
- Other Miscellaneous Matters.

Alcoholic Beverages

Drinking Age

In New York State, young people must be at least 21 years of age in order to buy or consumer alcoholic beverages. *Alcohol Beverage Control Law* § 65. The drinking age was raised from 18 to 19 in 1982, from 19 to 21 in 1985.

Misrepresentation

A young person who presents false I.D. or someone else's I.D. for the purpose of purchasing alcoholic beverages could be arrested and taken before the local magistrate or judge. *Alcohol Beverage Control Law* § 65-b. If the charge if found to be true, the young person could be fined up to $100.00 and placed on probation for up to one year. However, this determination would *not* disqualify a young person from holding public office or public employment or from obtaining any license issued by the state or local government.[1]

Any person who misrepresents the age of person under 21 for the purpose of inducing the sale of alcoholic beverages to an underage person could be found guilty of an offense and fined up to $200.00 or imprisoned for 5 days or both. *Alcohol Beverage Control Law* § 65-a.

Entertainment or Employment in Places which Sell Alcoholic Beverages

Persons under the age of 18 generally may *not* perform in an establishment which sells alcoholic beverages unless they receive a special permit from the state liquor authority. In order to obtain such a permit, the consent of both parents must be obtained and one of the parents must be present for each performance. However, a person under 18 may entertain on premises which serve alcoholic beverages where the following conditions are met:

1) the parents expressly consent to the performance in writing; *and*
2) the appearance is for a special event; *and*
3) the appearance is approved and sponsored by a primary or secondary school; *and*
4) the appearance is in the presence of the directly supervised by a teacher; *and*
5) the appearance does not take place in a tavern.

Alcohol Beverage Control Law § *99-f.*

---

[1] Governor Cuomo recently signed bills which stiffen the penalties which may be imposed against persons under 21 consuming alcoholic beverages.

Moreover, persons under the age of 18 may not be employed in any occupation where their duties require them to sell, dispense or handle alcoholic beverages unless they are working in a grocery store which has a grocery store beer license. *Alcohol Beverage Control Law* § 100.

Contracts

A contract is an agreement between two people to do, or not to do, a particular thing. Contracts can be written or oral. A lease is an example of a written contract. The tenant agrees to pay rent and abide by the landlord's reasonable rules and regulations; the landlord agrees to provide a habitable apartment and to allow the tenant to occupy the apartment in privacy in exchange for rent. An oral contract is created where one person orally promises something to another. A mechanic agreeing orally to repair a car in exchange for payment would be an example of an oral contract. However, their terms often are difficult to prove.

Perhaps the most important element of a contract is the agreement that each person will live up to his or her promise, and if the promise is broken, the other can sue in a court to require that the promise be honored, or for damages caused by the breach of the promise.

People commonly believe that minors may not enter into contracts. This is not true. Minors are permitted to enter into contracts and may enforce such contracts. However, such contracts usually cannot be enforced against the minor. It is for this reason that most people will not enter into contracts with minors. Even if the other party lives up to his promise, there is no way for him to require the minor to live up to his promise if the minor chooses not to do so. *General Obligations Law* § 3-101.

For example, assume that a minor buys a car and, two days later, decides that the purchase was not a good idea, for a reason having nothing to do with the car (for example, the minor found a less expensive car). The minor can inform the seller that he is returning the car and wants his money back. The seller could be legally compelled to return the money. The seller, however, could not compel the minor to return the car if, for example, the seller found someone who was willing to pay more money.

The following are exceptions to this rule of law:

1. Married minors are allowed to engage in certain real estate transactions. *General Obligations Law* § 3-101(3).
2. Married minors can be held liable for hospital, medical, and surgical treatment for themselves and their children. *General Obligations Law* § 3-102.
3. Minor veterans and their spouses are allowed to enter into certain contracts. *General Obligations Law* § 3-103.
4. Minor entertainers and sports professionals may enter into binding employment contracts with court approval. *General Obligations Law* § 3-105.

Necessaries

As a general rule, a parent cannot be held responsible for a contract of a minor child, unless the parent specifically agrees. The doctrine of "necessaries," however, can be used to hold both the minor and the parents responsible for certain needed services provided to minors. There is no all-inclusive definition of what goods or services would fit under the term necessaries, but items such as food, clothing, shelter, and other items which are essential to the life and comfort of the minor would be included. Needed medical, hospital and dental care would also qualify as necessaries. For these items, both the parent and the minor can be held legally responsible, even though the minor generally cannot be bound to a contract, and even though the parent never specifically agreed to pay.

Draft Registration

Young men are required to register with the Selective Service within 30 days of their 18th birthday. Appropriate forms can be picked up at post offices. Failure to register could result in imprisonment for up to five years and/or a fine of up to $10,000. It is important to remember that, as of this writing, there is not an actual draft.

The federal government has prosecuted vocal opponents of registration who have refused to register. This policy of singling out vocal resisters for prosecution was upheld by the United States Supreme Court in *Wayte v. U.S.*[2] The federal government has not been prosecuting young men who have forgotten to register, or who agree to register when asked by the authorities, even if the registration is late. At this writing, the government, once notified that a young man has not registered, has given him an opportunity to do so without adverse consequences. It is conceivable that this policy could change and that the government might begin to take a harsher position regarding young men who have failed to register.

We recommend that young men who have failed to register, but are willing to do so, consult with a person or organizations knowledgeable about selective service law before registering to find out if their past failure will have any negative legal consequences. We strongly recommend that young men who refuse to register also seek legal counselling.

Failure to Register and College Financial Aid

In 1982, Congress passed a law providing that any person who is required to register for the draft but fails to do so shall be ineligible for federal financial aid for college. Persons seeking financial aid must fill out a "Statement of Education Purpose/Registration Compliance" form. Students who register late will still qualify for aid as long as they register before applying for aid. Also, a person who is denied aid due to failure to register will be given a 30-day grace period to register.

This law caused some controversy, but was held constitutional by the United States Supreme Court in *Selective Service v. Minn. Public Interest Research Group.*[3] Therefore young men must register in order to qualify for federal financial assistance for college. Some colleges and universities have set up special financial aid programs for young men who refuse to register.

Women and Draft Registration

Young women are not required to register for the draft. This was held to be constitutional by the United States Supreme Court in *Rostker v. Goldberg.*[4]

Name Changes - Statutory Method

Law which Governs a Name Change

In New York State, the Civil Rights Law set forth the statutory procedure for a name change for both adults and minors. The procedure is started by filing a petition in the appropriate court. *Civil Rights Law* § 60-64. A fee must be paid to the court when the petition is filed.

Persons Who May File a Petition

Ordinarily, the petition is filed by the person who seeks the name change. However, in New York State, minors may not file petitions or file lawsuits in their own name. Therefore, the petition must be filed by an adult on behalf of the minor. The adult could be a parent, guardian or friend. *Civil Rights Law* § 60.

---

[2] Wayte v. U.S., 470 U.S 598 (1985).

[3] Selective Services v. Minn. Public Interest Research Group, 468 U.S 841 (1984).

[4] Rostker v. Goldberg, 453 U.S. 57 (1981).

What the Petition Must Show

The petition for a name change for both minors and adults must contain, among other things, the reasons for the name change, whether or not the person who seeks the name change has ever been convicted of a crime or adjudicated a bankrupt, and whether there are any judgments, liens, or lawsuits pending against the person. *Civil Rights Law* § 61. The intent of the law is to discourage or prevent persons from obtaining name changes in order to avoid creditors or other legal obligations or to hide the fact of criminal record.

Notice to Parents

The parents of a minor must be given notice of a minor's request for a name change, even if the minor is emancipated, so that the parent may make known to the court any objections which they may have to the name change. *Civil Rights Law* § 62.

Factors which a Court May Consider

A court will grant a minor's request for a name change where the reasons for the request are reasonable and where there are no reasonable objections to the name change, and where the interests of the minor will be substantially promoted in doing so. A court is given broad discretion in making this determination. *Civil Rights Law* § 63.

Steps to Take After the Name Change

After the name change process is completed, the young person should notify important agencies of the name change, for example, his/her school and the Social Security Administration.

Right to Vote

Anyone 18 or over who is a citizen of the United States may vote in state and federal elections if they have been a resident of New York State and the county, city or village in which they live for 30 days prior to the election.*

Miscellaneous Provisions

Right to Bring a Court Action

Minors are not entitle to bring lawsuits in their own name. They must appear with their parents, legal guardian, or adult spouse, unless the court appoints a guardian *ad litem*. CPLR, 1201. This provision, however, does not prevent a minor from bringing an action in family court.

Right to Own Real Property

Minors are not entitled to own real property. If a minor is given real property, the parents, or if the parents are deceased, the nearest and eldest relative becomes guardian of the property. *Domestic Relations Law* § 80. Even if a minor is married, guardianship over real property continued. *Domestic Relations Law* § 84.

Wills

Minors may not make valid wills. *Estate Powers and Trusts Law* § 3-1.1.

Board of Directors

The Board of Directors of certain not-for-profit corporations are permitted to include a minor as board members. *Not for Profit Corporation Law* § 701(a).

---

* Persons convicted of felonies may lose the right to vote. *Election Law* § 5-400.